IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

MRS. FIELDS FRANCHISING, LLC, a Deleware limited liability company,

Plaintiff,

vs.

MFGPC, INC., A California corporation,

Defendants.

Case No. 2:15-CV-94 DAK

MFGPC, INC., a California corporation,

Counterclaim-Plaintiff,

vs.

MRS. FIELDS FRANCHISING, LLC a Delaware limited liability company, and MRS. FIELDS FAMOUS BRANDS, LLC, a Delaware limited liability company, d.b.a. Famous Brands International,

Counterclaim-Defendants.

BEFORE THE HONORABLE DALE A. KIMBALL

DATE: JULY 13, 2021

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BENCH TRIAL VOLUME II

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P R O C E E D I N G S

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16:00:26 THE COURT: I think everyone's on. We have basically the same lawyers as yesterday.

Mr. Rothschild, you may call your next witness.

16:00:59 MR. ROTHSCHILD: Thank you, Your Honor. Your Honor, MFGPC calls Cameron Broadbent to the stand.

CAMERON BROADBENT,

the witness hereinbefore named, being first duly cautioned and sworn or affirmed to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

16:03:23 THE COURT: Thank you.

You may proceed, Mr. Rothschild.

MR. ROTHSCHILD: Thank you.

DIRECT EXAMINATION

BY MR. ROTHSCHILD:

16:03:28 Good morning Mr. Broadbent. Thank you for being
16:03:32 here. I want to ask -- your name has been mentioned a few
16:05:30 times in this proceeding, can you tell me what your relationship has been to Mrs. Fields. I understand you worked for the company. Can you tell us when you first began to work for the company?

A. Yeah. I was employee number 2 for the Brandon

16:21:57 retail division, started in about mid-2000 and was part of a two-man team that functioned there until 2006 as two people, and then we expanded probably to two dozen. I continued work until about, oh, I'd say, oh, mid-2013-ish. That was kind of the time frame for my time there.

Q. And so you were at the organization before Mr. Lindley and MFGPC became a licensee for popcorn; is that correct?

16:22:28 A. That's right. I was literally like started at ground zero where, you know, we didn't have any sales. Mrs. Fields had just acquired TCBY and with that came the first employee that was selling direct to grocery stores, mass market, club stores, with the TCBY acquisition and then I joined as, like I said, number 2. And, yeah, at the time

16:22:56 when I started there were just Mrs. Fields ready to eat cookie license that was just beginning as well as the chocolate license in the year 2000.

Q. Okay, what education do you have?

A. Yeah. My background is in -- my undergraduate university in food science and nutrition. I did a master's

16:23:24 degree both in, just a custom one, Brigham Young University, both in business and food science. Probably the best education I got, though, was the first two years of growing the business at Mrs. Fields, though, where, you know, I was responsible for product, packaging, worked alongside some --

you know, two brand new start ups and then I got to be involved with each start-up that went to work.

16:23:55 Q. Okay. Tell me, what was your position again at Mrs. Fields when you first started?

A. Yeah. So, beginning -- I had just come off of joining Kraft Foods and there I worked on product and packaging, consumer research, and Mrs. Fields I went right into a role as brand manager and worked in that role, having responsibility for direct sales, product development,

16:24:29 package development, and then monthly calls with each of the licensees talking about each channel of sale, each, you know, specific customer and in some cases buyers even, challenges with the business, successes with the business.

I continued until 2006 as the brand manager at

16:25:23 which time *Kimble Grove was in some financial trouble. We acquired the ready-to-eat cookie business. We went from two people to about two dozen. Our goal at that time was to

16:25:59 stabilize the business, turn it around and grow it, and that's in essence what we did. The first couple of years, I was responsible for every -- was the net sales manager as well as having key accounts myself across different channels of sale. Ultimately I was responsible -- as the years went on, I was responsible for half the C-Stores in the U.S., all

16:26:27 international business development outside of Canada, club business worldwide, and then the alternative channel, Dollar

Stores, 99 Cent Only, Big Lots, places like that and I continued until the sale in 2006.

Q. Mr. Broadbent, I'm asking if you would do a little bit of a favor just to have mercy on the court reporter and talk a little bit slower so she can take your speech down.

16:26:58

A. You bet. And I'm sorry.

Q. Thank you.

A. Would you like me to repeat anything or would you like maybe a clarification of anything?

Q. No. I think that's fine. And help me understand, when did you first run into MFGPC or Chris Lindley?

16:27:28

A. So, I believe it was around, boy, 2001, 2002 was our first interaction with Chris and the idea of licensing a category that we weren't really pursuing heavily at the time, and that was popcorn.

THE COURT: You're starting to trail off a little, Mr. Broadbent, at the end of your testimony.

MR. BROADBENT: Oh, okay. Sorry about that. Yeah.

16:27:59

So, about 2001, 2002 was when, you know, I came in contact with Chris Lindley, and I believe he approached Mrs. Fields about doing the popcorn business, and we began to evaluate the opportunity together at that time.

Q. BY MR. ROTHSCHILD: And who negotiated the trademark license agreement? And when I say trademark license agreement, are you familiar with MFGPC's license?

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A. Yeah. I do recall it. I mean, it was almost 20 years ago, but I recall it pretty well, actually, the -- I think we started as -- the license may have originated with LHF and then that changed over to MFGPC. We never used the term really, but in essence I knew that that was kind of code name for Mrs. Fields gourmet popcorn clusters.

Q. I am showing you a license agreement. This is Exhibit 3. Is this the license agreement you were just referring to?

A. Yeah. You can see it was LHF that started and then we transitioned to MFGPC later, but that's the one it looks like.

Q. And who at Mrs. Fields negotiated the terms of this agreement?

A. So -- so my role was to put together the package, evaluate the package, make a recommendation, evaluate it among my peers in marketing as well as the senior vice-president of marketing for, you know, Mrs. Fields overall. And then I believe it was Michael Ward who was the legal counsel at the time would negotiate the final points of it. But, you know, it was certainly something across my desk in the process.

Q. I'm looking at section 2 of the license, and in the license grant here, it grants the right to use the license names and marks, to manufacture and market royalty bearing

products. And, again, the license -- the license names and marks are -- it's just Mrs. Fields. You see that?
A. I do. Yeah.
Q. And do you -- what is Mrs. Fields? What's the value of that?
16:32:28 A. So, and, you know, at this time -- so, I loved the brand. I mean, the brand in the year 2000, Mrs. Fields was literally just leaving herself. She had just finished -- you know, she was on television. She had started 19 Mrs. Fields bake shops, and in the year 2000, we were just starting retail products at grocery stores and mass
16:33:30 marketers. The brand, in essence, stood for all things that were good and indulgent and really the goodness of a snack. I think as we look back, that's kind of the essence of the brand, I would say, would be like a sweet indulgent moment,
16:33:57 with all the goodness of the homemade snack.
Q. Okay. And what -- do you have any metrics on the trademark; for instance, trademark awareness of Mrs. Fields at that time?
MR. AMANI: Objection.
THE COURT: Was that an objection?
MR. AMANI: It is an objection, Your Honor, yes. We're talking about the metrics of the trademark in the
16:34:30 years 2000 to 2006. Now we're 15 years into the history of this company back. And, you know, I would just appreciate

16:34:47 it, with these witnesses in particular, since none of them have anything to do with this case, that we try to get to something that links it to what we're doing here. That's my opinion.

THE COURT: Well, I think it's background. Go ahead, Mr. Rothschild.

16:35:24 MR. ROTHSCHILD: Your Honor, I actually think it's more than that, and the answer that I would give to why it's relevant is, the agreement was for the license of a mark. What was the value of that mark? This Court ruled that the core relevant issue, of the value of the trademark license agreement, and we just established that it was for the license for the use of Mrs. Fields, and now I'm asking, well, what is the awareness among consumers for that mark?

THE COURT: Well, and I said you could go ahead. Go ahead.

MR. ROTHSCHILD: Thank you. And I want Mr. Amini to understand that as well.

16:35:53 MR. BROADBENT: Yeah. I'll just go ahead and

16:36:10 answer that question, then, if it's all right. So, when we

16:37:29 started in the early years of 2000, we used a number that represented research where people went out and actually asked inside of malls, back in 2000, early 2000 -- up through 2006 we were still using this number, but when they asked people that were stopped in a mall: Hey, do you

recognize Mrs. Fields?

Well, Mrs. Fields had such a presence that 94 percent of respondents said: Yeah, I recognize Mrs. Fields. Those are cookies and we are familiar with them as we come to the mall.

16:37:57

Q. BY MR. ROTHSCHILD: And do you have any idea about positivity perception of that mark?

A. Yeah. I mean, one of the very reasons I joined was because of the -- just who she was. She was still relevant to the brand in 2000. Everyone was really pretty positive. Even when we took the product to the trade, people were excited about seeing a Mrs. Fields product. Whether it was a buyer or consumer, people were pretty positive and excited about seeing the product and eager to taste it, kind of excited to see what she's come up with.

16:38:29

Q. I want to look again at this license agreement. And you said you were generally familiar with it, even after all these years?

16:38:59

A. Yeah.

Q. Did you have to refer to it occasionally as you did business with MFGPC?

A. I did. So, while I was brand manager, it was my responsibility to interact with all the licenses, and we would review -- like, when a new prospect would come in, I would take a look back occasionally and read through it and

16:39:27 confirm because the terms of each one were slightly different.

Q. Do you recall whether -- I'm looking at Section 16 of this agreement right here, and I'm highlighting this area of the agreement, and it provides on the fifth line here for automatic renewal for successive five-year terms. Do you recall that term?

A. Yes.

16:39:56 Q. And do you recall Chris's agreement, whether it auto renewed in 2013 and -- I'm sorry -- yeah. Yes, 2013, were you still at the company?

A. I was still at the company, yeah.

Q. And do you recall any -- do you recall whether, at that time, the agreement auto renewed?

A. Well, figure back in time, I was leaving mid-2013.

16:40:30 I believe it renewed the year prior. After I left, I suspect it renewed or at some point something happened, or

16:40:39 we wouldn't be here, but I don't recall at the end of the year specifically if it renewed, but I suspect that it did.

16:41:14 Q. Okay. Do you also recall the termination provisions here at all?

A. Yeah.

MR. AMANI: Objection, Your Honor.

THE COURT: I'm not sure what you're getting at here, Mr. Rothschild. We've got this in evidence, and there

16:55:57 have been rulings on it by prior Courts.

Q. BY MR. ROTHSCHILD: Okay. The only thing I want to ask then, Mr. Broadbent, is whether, at Mrs. Fields at the time, did Mrs. Fields believe that this agreement could not be terminated absent a breach by MFGPC?

MR. AMANI: Objection, Your Honor.

THE COURT: What are you objecting to, a legal conclusion or?

16:56:29 MR. AMANI: Legal conclusion. Mrs. Fields' opinion -- what was Mrs. Fields' opinion? Foundation. You know, it's not clear to me this man has authority of any, -- what his authority was. And, again, as Your Honor said, there have been multiple rulings on this. Whether they believed it was terminable or not is irrelevant to why we're here. It was determined that it was wrongly terminated.

16:56:59 THE COURT: What was the last thing you said?

MR. AMANI: Whether they believed -- whatever the beliefs were at Mrs. Fields are irrelevant to why we are here today. The Court has already ruled on the termination and liability in the case.

THE COURT: Well, they have. That objection is sustained.

MR. ROTHSCHILD: All right, Your Honor, I'll move on.

Q. BY MR. ROTHSCHILD: Relative to other licenses at

16:57:28 Mrs. Fields -- you said you managed all of them -- was this an advantageous license or average?

MR. AMANI: Objection, Your Honor. Again, relative to licenses at Mrs. Fields? I don't know why we're having that conversation.

THE COURT: Well, if he has an understanding about it, I'll let him ask a question about it.

MR. BROADBENT: Yeah. Just to finish the answer to that question, yes, this was probably the most advantageous

16:57:59 license that we did, so there's not specific -- he had --

16:58:07 from memory, it was like he had to pay a hundred-thousand

17:00:57 dollars every year for five years, and then basically he had to pay royalties ongoing. The category wasn't the core of Mrs. Fields' business, so we saw the product and packaging was great, so we moved forward with it under the terms that you see and can read about.

Q. BY MR. ROTHSCHILD: Was there anything else about it that was advantageous or, you know, from a licensee perspective?

17:01:26 A. Yeah, as the worldwide rights. You know, it wasn't

17:01:31 specific to just like the United States. Worldwide rights were, you know, advantageous, I'd say, you know, and create value in a way that might be unique with licenses.

Q. Tell me about MFGPC's performance as a licensee. Was MFGPC a good partner?

A. Yeah. Most certainly.

17:03:28 MR. AMANI: Can -- objection, Your Honor. Can we establish a time frame for his testimony on this? I understood he left this part of the business in 2006.

17:03:38 That's why I'm asking.

THE COURT: Establish a time frame, Mr. Rothschild.

Q. BY MR. ROTHSCHILD: Okay. Let's start with that, when MFGPC began and up until you left as brand manager,

17:04:25 which I'm guessing, based on Mr. Amani's testimony, was 2006?

A. That's right.

Q. How was MFGPC as a partner?

A. Yeah. They were great. I mean at every level. From a product standpoint, we sold the same product at Mrs. Fields' catalog, mrsfields.com that we took to actual retailers. He embraced everything that was the essence of

17:04:56 Mrs. Fields. In fact, it was almost like an aspirational license because he was going all natural at a time we weren't yet all natural. And then he went to retailers like Dillards. And so we saw it -- like he had packaging and product that was designed for every channel, from high end places like Dillards to club stores, to mass marketers like Wal-Mart and target.

17:05:27 Q. Tell me about MFGPC's growth. The fact that MFGPC wasn't selling huge amounts of popcorn, wasn't that

concerning to Mrs. Fields?

A. You know, his business model was similar to the chocolate business, if you looked at the year 2000, when the chocolate company came in, and for a couple years, their core business consisted basically of selling Christmas and Valentine's chocolates, and they didn't pay slot. And that was similar to the model of MFGPC. They come in. They bring quality product and quality packaging. We try and get a foothold in a market and use that foothold as leverage to expand in the marketplace. We understood that initially. We committed MFGPC with several years of guaranteed minimums and then he went to work at it. And, you know, and then I would check up on him on a monthly basis as like -- as I did with other licensees.

Q. You left the brand liaison spot in 2006, correct?

A. That's right. Yeah, with the acquisition of the ready-to-eat cookie business, I moved over to that.

Q. And did you still have any interaction with Mr. Lindley or MFGPC after that?

A. Yeah. It was still important because all licensees include -- and the direct business that we did and the core of the Mrs. Fields products basically having the cookie, we were the bulk of the product sales going to market. So it was important to us to have a common front to all the retailers, so we talked. You know, we tried to meet

annually during the six years I was brand manager, but then we would talk about key accounts. Occasionally I would call and just check in to see what he was presenting to Target, what he might be doing at BJ's Wholesale Club. Those are the kinds of discussions, so that we had the same front to 17:08:30 the trade and appeared like we were a cohesive group the best we could.

Q. Tell me about MFGPC's packaging. Was it -- I'm sorry, let me withdraw that. Co-packers, tell me about MFGPC's co-packers. Were you familiar with them?

17:08:53 A. Yeah. I'd say that was one of the strengths, and similar to our own business, we ran direct sales for TCBY, and we would present TCBY product and then we also owned an ice cream plant that made all the TCBY product, and we presented private label business to places like Sam's Club 17:09:26 and obtained that business on the TCBY side.

And his business model was similar in a way. He had a co-packer. When he pitched to retailers, the pitch could include, and sometimes did, the idea that he would actually do like a Target, for instance. At the time, they would do some private label business. And so part of the pitch was: Hey, we have the Mrs. Fields high-end product. We can also provide a lower-end product through our co-packer.

And so it was -- it was attractive. I mean, it was

very similar to the business we were running, so it seemed natural and attractive to us, and it seemed like a quality way to go to, you know, the trade, to provide multiple solutions for the trade and presenting to the customer.

Q. I want to go back to something. You said that, you know, it wasn't concerning to you that MFGPC wasn't going gang busters in early years. I mean, is that a legitimate business model in your mind? Do you use that?

A. Yeah. I mean, whether it was chocolates or whether it was TCBY product or the direct sale we picked up, even after leaving Mrs. Fields, my first thing that I did was actually team up with a distributor that we were pitching product in Paris, France and hopeful to expand that business into France. And the business model was similar. It's develop product that's of the highest quality, establish it in the eye of the consumer as like the indulgent treat that one would enjoy. After you get a foothold with the product quality and the level of packaging at the highest level, then you can slide into other, like mass marketers, like a Target.

So it's a very simple -- or it's not simple, but the idea is start in a company like Dillards, start in a place like Costco, where you can establish just a super premium product and then try and push it out into the mass market And Chris Lindley did that, you know, effectively

with a high-quality product, high-quality packaging. And that business model, like I said, was one that we used and were familiar with. And even at the end, it was the same model. I would go out -- if I were to start in another company I would probably follow a similar model.

Q. And when you -- when you say that, you know, you start off slow and establish a foothold, is it concerning to you that you don't earn profits in the first, second, you know, maybe, you know, many years, given -- given the slow growth? Is that a concern to you?

A. You know, the idea -- like when we picked up the ready-to-eat cookie business, a good example, our goal was not to -- we were just trying not to lose money first as we established ourselves. We worked to make every deal positive. And every year, with each account, we tried to stay at least slightly positive and not negative. We recognized that investment has to be made one way or the other.

From memory, the ready-to-eat cookie business, the very core of the brand, was the only business that just came out and put slotting dollars down all across the grocery channel to push distribution to go from, you know, zero to, what, 40, 50? If you're going to put buckets and go zero to 50 million, a hundred million; you know, the goal, the first bucket is 50 million, and, you know, you can -- you can work

towards that if you have a lot of slotting dollars. If you don't, then it's going to be a slow burn.

Q. And when you -- you say the ready-to-eat cookie business did that. Did the ready-to-eat cookie business, you know, since you said it paid slotting dollars, did it real boost it's sales?

A. You know, I think just looking back from memory, we went from zero to like 40 million, 50 million, that kind of first bucket within two years because of that. And the challenge --

Q. And did it -- - did the licensee continue successfully, after having pushed sales that high?

A. I think they continued successful for several years. It was owned by -- the license was owned by a Nonni's at the time, and Nonni's ran their own biscotti business and they ran the Mrs. Fields ready-to-eat cookie business. They ended up selling their own Nonni's business, and the remaining business was just Mrs. Fields ready-to-eat cookies, and they began under the name Shadewell Grove. And they ran under that with basically the same overhead but ran into, I think, challenges meeting their own overhead. And by 2006, they were looking for a partner to sell the business to, but in 2006, Mrs. Fields Corporate ended up acquiring it.

Q. At some point, you left Mrs. Fields. About, again,

what year was that?
A. 2013, I believe.
Q. And you maintained some relationship with MFGPC; is that right?
A. Yeah. Yeah. I think, you know, I worked the entire time and knew Chris, and we were still in contact. At the end of 2013, I was also -- I still loved the brand. I loved start-ups as well, you know, and I looked to work with Neal Courtney. Neal Courtney, at the time, was becoming the CEO of Mrs. Fields. He had been the general manager of our little business, and he was becoming the CEO or was the CEO about 2013.
And, you know, towards the end of it, I was trying to figure out a way that I could work on -- continue to work on Mrs. Fields' business, and if I had the opportunity to, in essence, work on another start-up, you know, I saw value in Chris' business, enough so that I would tell my wife and family that I think it's time we do another start-up, just like 2000 or 2006 when we saved a business from bankruptcy. It was time to do another one. And I believed there was value in it and wanted to try.
So I tried to work out something with Neal Courtney to see if there was a way that we could -- that I could get paid, even if I took a pay cut the first year, that if I could work for maybe a split or some way in which I worked

partly for Mrs. Fields and partly for MFGPC, we could find a way forward and then grow the business similar to -- and using the same model we had already used and, you know, I'd run from zero to, you know, the first two years, start up and then turn the business around in 2006, just trying to apply the same business principles we used there, try and do it again with Chris Lindley, his business, focusing on it full time. That was kind of the idea.

Q. Take a look at Exhibit 49, which we have admitted in this case. Do you recognize this?

A. I do. I've seen this before and last time we were talking in court.

Q. Do you -- do you know who created this?

A. You know, to admit, the first time I saw it, I wasn't sure, but then as we went on, I was clear that I created that. It had been a little while, but I could tell and even now I can tell the way in which it's put together, it's put together with talking points that I could actually approach the CEO, and in an environment where we were maybe down-sizing, I was asking to be coming on as -- you know, as a new hire. So these were kind of talking points from memory that I put together, you know, to discuss with him.

Q. And did you -- what was the purpose of this pitch, as you called it?

A. Yeah. This was -- I apologize. I mentioned it.

Just the purpose was primarily for me to find an opportunity to work on the MFGPC business as an employee of Mrs. Fields and as an employee of MFGPC. That was kind of the idea that -- in our discussions that we kicked around.

Q. Take a look at the second to the last bullet point here. Are you referring to Chris Lindley there?

A. When I say Chris or -- oh, the CEO. Let's see, in order to survive the implosion -- yeah. That's referencing his own business, some of the challenges he faced in 2013, at that time.

Q. And did you have knowledge of whether he was, as you say here, being compensated by another business?

A. You know, it's -- I wouldn't put it in there if I didn't think either in the past, in the present or in the future he was doing something that might generate an income. I consider Chris to be almost like a serial entrepreneur. Literally similar to how a CEO runs Mrs. Fields, TCBY, Great American Cookie, Hot Sam, Pretzel Time, Pretzel Maker, they stretched their expertise over several businesses, and I likely thought he might have been doing the same, while also focusing on MFGPC.

Q. So, but you didn't then have a foundation to say that he was then being paid. You used the word "now."

A. Let's see: The CEO recently became engaged in another business that is now compensating him at levels

equal to an income.

Yeah. Excuse me. I have to read it again. So, it looks like I had a belief, at that time, that he was being compensated for his marketing efforts, what he was doing in some business.

Q. Do you know whether he was still working full time at MFGPC, though?

A. Oh, he certainly was, yeah. I mean, just because -- I mean, he had the whole license. He wasn't in the process of selling it. He was -- he still was managing that and the challenges he faced with that.

Q. And I'm looking here at this, this page 4 of the presentation. You're pitching your potential job here; is that correct?

A. That's right. You know, and Neal Courtney knew me pretty well from the time, you know, we did the start-up or basically picked up the ready-to-eat cookie business from -- I'm not sure when he actually started at Mrs. Fields. He didn't become the general manager for a couple years because we started with some other folks in place when we grew from two to two dozen people, roughly. I think he came into it a couple years into it, and then he knew me from that time all the way up until 2013, where he asked if I would basically shut down the business with a smooth transition to the new buyers, so I literally became the last man standing and last

full-time employee at Salt Lake City, resolving every issue with, you know, every client, every issue that came up to just make a smooth transition.

Q. Okay. I want to focus on the second bullet point here about your compensation. You've kind of given an "or" here, salary commission or a high-profit sharing split on new business. And then potential for equity. Do you see that?

A. Yeah. And I recall the equity thing. Having just finished with the sale or being in the process of selling the Mrs. Fields cookie business, I didn't have equity at that time, so I think that was on my mind and part of the idea or the attractiveness really of what kind of was, still, a slow burning, growing business, you know, something we were trying to get off the ground in a bigger way.

Q. Okay. And -- but did you actually have an agreement that you finalized with these numbers?

A. No. We did not. We never came to a final agreement.

Q. Okay. And you're asking here for, you know, a good bit of money from Mrs. Fields, forgive his royalties, some significant additional investments. Did you get that from Mrs. Fields? Did they agree and give you all these things?

A. No. You know, that wasn't -- we couldn't really move the whole deal forward, actually, and that was --

Q. So this never actually happened, and the projections that you put in this presentation never came to be?
A. That's correct.
Q. Was Chris' business alive and well in 2014?
A. You know, I still recall having left Mrs. Fields and focusing then on the start-up in France. I don't remember regular conversations with Chris in 2014. I remember the challenges in 2013 going into '14. It was probably a challenge. Yeah.
Q. What -- what, in your mind, killed Chris' business?
A. You know, I think overall the product was fantastic and great for the time we started, but I would say that the appetite of consumers kind of shifted, and you can see it today actually if you walked into a Sam's Club where you see ready-to-eat popcorn. You see Skinny Pop. You see pickled -- in Sam's Club you see pickled flavored popcorn. You see Popcorn Indiana's kettle corn with drizzled white and dark on it. It seemed like --
Q. I'm going to ask you --
A. I was going to say, it seemed like --
MR. AMANI: I'd like to hear the answer, Your Honor.
MR. ROTHSCHILD: I'm sorry, I thought he was done. I thought he was at a stop there.

THE COURT: Go ahead and finish your answer, Mr. Broadbent?

MR. BROADBENT: Yeah. Sorry about that. It felt like one of the challenges seemed like there was a consumer shift in appetite for a lighter product, and so that was probably a direction that, you know, the market is kind of going. And I'd say kind of the challenge with it, the other challenge core to the business was, he lost his co-packer to a fire. His investment banker died. Those things took down investment and took down his production in 2013. Those are significant business challenges.

There is also -- like Mrs. Fields had certain requirements, packaging changes that had to be made. I had to meet those as well. That trifecta of challenges, I'd say, was significant then and material and would require, similar to how we did it in 2006, when we face a business challenge or when we have to turn the business around and keep going to survive or when we got into 2009 in the financial crisis and the Mrs. Fields ready-to-eat cookie business was struggling as well. We had to find a way to survive, change, and continue to adapt.

Q. So, in January, 2014, though, you -- at the end of 2013, now it's 2014, you went and pitched this to Mrs. Fields. I'm just looking at the date of this presentation; is that right?

A. I'm sorry. I didn't see that. Okay. I see it now.
Q. But despite these challenges you just went through, the investment banker and the co-packer, by this time was Chris back up and running?
A. Yes. Yes. He had a co-packer up and running and capable of doing this. And boy, and I didn't put that timing, January, 2014 to it actually. I was still kind of stuck in mid-2013. I apologize. So, yeah, he had the license. He had a co-packer. I saw potential in it. I wanted to work on it, and that's the reality of it and the basis for this.
Q. And so you understand that Mrs. Fields wrongfully terminated MFGPC at the end of 2014, right?
A. I did understand it. I didn't know the exact date and timing, but I understood that he was terminated.
Q. And when that happened, was his business alive?
A. It was.
MR. ROTHSCHILD: I have nothing else for Mr. Broadbent.
THE COURT: Thank you, Mr. Rothschild.
Mr. Amani, you may cross examine.
MR. AMANI: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. AMANI:

Q. Good morning Mr. Broadbent. What do you do now?

A. Today I manage a portfolio of assets similar to what I did before, but I do properties instead of brands.

Q. Real estate?

A. I'm a real estate broker.

Q. And you mentioned some start-up in France. How long did you work on that?

A. About a year and a half.

Q. And what happened to that?

A. Well, I was -- I was paid on an hourly basis to help them start up and got to a certain point where they had all the products that they wanted for what was basically an American portfolio of brands, and after about a year and a half, they didn't need my services to acquire more brands. They just took off with the brands that they had.

Q. You have a lot of experience, it sounds like, in licensing and brands from your experience at Mrs. Fields; is that correct?

A. Yeah, working -- I'd say most of the experience is working with accounts and channels of sale, and then six years of experience with licensing.

Q. You mentioned the investment that had to be made when you start -- when you start up one of these companies.

Do you recall that?
A. Yeah. I would believe any -- I mean, I still believe any company that is going to start up is going to require investment with time, energy, some type of financial resource and a commitment to packaging, product development.
Q. Packaging, product development. What other investments? From your experience in starting these businesses up, what other investments does a company have to make?
A. Yeah. Depending on which direction one's going to go, like if you're going to go like an MFGPC or a Mrs. Fields chocolate company, we're going to try and penetrate the market. Without any slotting dollars, one has to adjust their business model some. So you kind of have to make that -- it feels like you have to make that decision up front, whether you're going to take investment dollars or not, because that can be quite significant.
Q. What else? The packaging. You mentioned packaging. What kind of investment do you have to make in packaging?
A. It depends on the -- you know, you could be doing anything from custom film to folding cartons to cases. I mean, every step of the way, like from where the package goes, where it's going to be inventoried, how it's going to ship, how you're going to handle customer service when that

package reaches the consumer when they have a response to it, how you're going to manage that response.

Q. And do you do packaging once and then it's fixed in time and it never changes, or do you have to continually invest in it or something else?

A. Yeah. At Mrs. Fields typically we ran for, I'd say, maybe several years, maybe three years. We'd start up. We'd run for -- on start up would be your first year. Second year you'd push it out. Third year, you would continue with it, and maybe fourth year you would be transitioning to something new.

Q. You're talking about packaging now, right?

A. I'm referring to -- yeah. I'd say that's kind of just a life cycle, if you would, of product over time --

Q. What about marketing?

A. And then --

Q. I'm sorry.

A. Packaging updates consist of -- you don't -- you don't change -- the brand I worked on, the Jell-O brand, you don't change necessarily. And it was there for 60 years. We wouldn't change exactly, you know, what it would look like. We would make small tweaks to it and adjustments to refine it to the taste and the pallet of the consumer to make it relevant.

Q. Do you need to invest in marketing?

A. We would. In some cases, we would use any type of gorilla marketing. We'd start with gorilla warfare marketing, really, and in some cases, one of the -- you know, I just recall, for instance, sitting across the desk from the Chicago -- like in Chicago at the Costco midwest buyer's office. That's one way we literally build the product with the buyer at Costco. They take pride in the product that they created with the manufacturer, and then we'd launch. And that's one way to enter the market.

That's one way that, like a gorilla warfare method for -- for starting out. Once we get into that market, then we go around to the different retailers in that region and try and push into -- further into the market, and that's just an example of the way we would market without investment dollars. If we have investment dollars, we're going to go, you know, a different path. We're going to tie into the brand overall and what they are doing at Mrs. Fields Corporate and look for synergies there and then we're going to use a number of different vehicles to market the product.

Q. I want to take you back to Exhibit 49, which is a document that Mr. Rothschild showed you.

A. Yeah.

Q. This was your presentation to Neal Courtney in January, 2014?

A. Yes.
Q. Do you recall that?
A. Right. Yes.
Q. Did you work on this alone and send it to him without sharing it with Mr. Lindley?
A. You know, parts of this I'm sure I discussed with Chris Lindley. I didn't come up with every -- like every idea here myself, but this is my presentation, and, you know, it came from me as a proposal I wanted.
Q. You had this page that I have up here, called critical needs. Do you see that?
A. Uh-huh.
Q. Was that your own assessment of what the needs of the company were at the time?
A. You know, I believe that to include -- you know, I probably had discussion with Chris Lindley about the critical need as well, you know, and specifically the need to hire someone and bring someone on who's already familiar with the trade, familiar with the Mrs. Fields brand and familiar with launching the Mrs. Fields brand in a bigger way.
Q. And why was there a need for that at this time, in 2014?
A. You know, coming off of a year where the co-packer literally went down due to a fire, you take sales down that

low, you're almost like a new start-up, having to adapt to the business.

Q. That was going to be another question I had for you. You mentioned when you spoke to your wife about making this transition, you talked about I think the excitement that goes with it's time to go to another start-up; is that correct?

A. Yeah. That was kind of like the sales were lower at the time and, you know, that was kind of the -- the excitement around the potential and, you know, looking forward to another challenge.

Q. If you --

A. -- and I was excited try again.

Q. I'm sorry.

A. Oh, no.

Q. I just wanted to say, from your perspective, you viewed this opportunity as a opportunity to get on board with a start-up?

A. Yeah. It was something still in a small state at that time, in, you know, in 2013, beginning 2014.

MR. AMANI: I don't have anything further, Your Honor.

THE COURT: Thank you, Mr. Amani.

Mr. Rothschild, any redirect?

MR. ROTHSCHILD: No, Your Honor. Thank you.

And thank you, Mr. Broadbent.

THE COURT: Thank you, Mr. Broadbent, and you can be excused.

And, Mr. Rothschild, you may call your next witness.

MR. BROADBENT: Thank you.

MR. ROTHSCHILD: Your Honor, I would like to call Mr. Joe Scavitto to the stand, please.

THE COURT: I'll ask my clerk to swear in the witness.

JOE SCAVITTO,

the witness hereinbefore named, being first duly cautioned and sworn or affirmed to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

THE COURT: You're muted.

MR. SCAVITTO: Can you hear me now?

THE COURT: Yes. Thank you.

MR. SCAVITTO: Sorry about that.

THE COURT: Thank you.

You may proceed, Mr. Rothschild.

DIRECT EXAMINATION

BY MR. ROTHSCHILD:

Q. Mr. Scavitto, can you briefly tell me what your business is?

A. My business at the time was Gabe's Candy and Nut House. We were the co-packer for Christopher Lindley and Mrs. Fields popcorn.
Q. And where are you located?
A. At that time, it was in Bensalem, Pennsylvania, a suburb of Philadelphia.
Q. And what products did you make for Mrs. Fields popcorn?
A. We drizzled the chocolate popcorn and packaged off the popcorn that was not even chocolate covered.
Q. Okay. And what is your experience and background generally? What do you do?
A. Well, I do chocolate. I've been doing that for 30-something years. And we co-packed -- I believe we started with Chris somewhere in the 2009 time frame.
Q. And you did business under the name Gabe's?
A. Gabe's candy. It was a partnership.
Q. Who were your other customers -- oh, sorry. Who were your other customers?
A. Well, we also had a retail shop, so we did a lot of our own packaging and stuff for ourselves. We had also done some co-packing for Darlette Jenkins, which was Toad-Ally. We would do their overflow work. And we actually did some co-packing for Cargill Chocolates. They're a Siglent brand. We were also doing some stuff for -- pharmaceutical stuff

for Cargill, too.

Q. Is the production for MFGPC, the Mrs. Fields popcorn, was it a simple preparation or was it a difficult, complex product?

A. It was simple.

Q. Did you have any involvement in putting together packaging or packaging the product as well?

A. Yes. I was in charge of production.

Q. And is that -- is that difficult? I mean, is it ornate? I mean, tell me about that.

A. Not really. I mean, most of it is logistics like getting all the materials and stuff in and, you know, planning time to make sure that, you know, you don't run out of something. That would be pretty much the hardest part is the logistics in making sure that you have all the supplies, and then once you had that all straightened out, then you had to make sure that you had the staff to be able to, you know, do the specific run or whatever was required by the customer.

Q. Was MFGPC a good customer for you?

A. Yes.

Q. Did you have capacity, excess capacity to produce additional popcorn if he had ordered it?

A. Yes.

Q. And how much? Can you give me a scale?

A. Well, when we first started, we were pretty limited with the equipment, and we were actually upgrading the equipment as we were going along. I think at the time we were probably doing somewhere around 3 to 600 pounds of popcorn an hour, and just before the fire, we had extended the line to produce almost up to -- I want to say around 900 to a thousand pounds an hour.

Q. And, I mean, relative to MFGPC's orders, does that give you the capacity to, you know, to produce 50 percent more than he ordered or a hundred percent more or multiples more than what he ordered from you?

A. I'd say a good 50 to 70 percent, somewhere in that range.

Q. So you could have scaled up your popcorn production for him by at least half?

A. Yes.

Q. As you produce more, do your margins go up or down?

A. The margins, they -- I'd say our margins go up because the cost of doing business goes down.

Q. Why is that?

A. Just because you get more efficiency as you're going and you don't waste the clean up time, the shut down and all the starting and stopping issues that you would normally associate with running a business.

Q. And tell me about the popcorn category. I mean,

you're still in the popcorn category, correct?
A. No, I'm not. My business partner passed away, so the business is actually closed. I'm actually working for somebody right now.
Q. What is your -- what time frame did you exit the popcorn category?
A. Well, we pretty much stopped doing the popcorn pretty much as soon as Chris had stopped doing business with us, but, I mean, the business kept going on with the packaging and co-packing up 'til 2019.
Q. And did you observe any increase or decreases in the popcorn category during that time?
A. I really couldn't say, I mean, because we were pretty much exclusively doing the popcorn for Chris as we were going on. I felt that we were doing more and more business, up until the 2013 time frame when our next door neighbor had the fire, which shut our place down.
Q. Tell me about that, that fire. What happened and how did it impact you?
A. Well, basically it started in a space heater. We were told that the person was cold and they must have left it on over the weekend, and we were actually all away at a trade show, and the fire had smoldered for three days, and nobody noticed it because there were issues with the fire alarm system in the entire complex and then that was pretty

much it. You know, your world was turned upside down or at least my world was.

Q. Did you have direct interaction with Mrs. Fields, as opposed to Mrs. Fields popcorn?

A. No.

Q. Do you have any relationship or touches with the stores or delivery of popcorn to customers?

A. Well, through Chris. I mean, whatever he would -- we would ship out, you know, direct to whatever customers that Chris had supplied in the purchase orders and stuff like that. I mean, the only other contact that we had was at the trade show. For our own business, we would actually, like the stuff that is behind you, we actually had it on display as, you know, trying to get more co-packing business. These are things that we had done.

And we actually had Mrs. Fields' actual store, the Mrs. Fields Store brand customers would come up to us, and they would ask us, how could they actually purchase the stuff that is behind you on your desk. But we would forward the information to Chris, but apparently there was -- there didn't seem to be anything that Chris could do to get Mrs. Fields to carry it in their stores, and even though the store managers had wanted it.

Q. Thank you. Would you -- I mean, aside -- setting aside the fire, did you eventually get the plant up and

running again?
A. Yeah. It took about six months and then we started producing again. I believe we did, like, maybe one or two more orders for Chris, but then he was also using another co-packer, too, so everything was kind of like in half, I guess.
Q. And if you had been given large additional orders, would you have been ready and willing to make additional orders for hi?
A. Yes.
Q. And tell me about trade credit. When you -- when MFGPC sends you an order for popcorn, when does it have to pay for it?
A. Typically, at the time, I think we were on 30 days. Again, he supplied all the materials so there was no cost that way. It was basically 30 days, at least for the chocolate portion. Any chocolate that we used had to be paid in 30 days at the time.
Q. So, let me just back up a little bit. He supplied -- did he supply candy-coated popcorn already or did you pop the popcorn?
A. No. He supplied the candy popcorn.
Q. Okay. So you --
A. We just did the chocolate and the did the packaging.

Q. Okay, so you drizzled and packed it, but it had already been popped and candy coated, right?

A. That is correct, yes.

Q. And did you ever have a discussion with Chris about potentially extending him trade credit or perhaps other ways of sort of expanding or capitalizing the business?

A. Not -- we really didn't. I didn't have any conversations directly with Chris about that. That would have been my business partner, but I don't see any reason why we probably couldn't have gone to, like, 60, 90 days because our -- our portion of it was really a minor investment. It was mostly labor.

Q. Okay. Thank you, and I have nothing else for you, and I appreciate you being here today.

THE COURT: Thank you, Mr. Rothschild.

Mr. Amani, you may cross examine.

MR. AMANI: I have no questions, Your Honor.

THE COURT: Thank you. Mr. Scavitto -- am I saying that correctly? You're excused. Thank you?

MR. SCAVITTO: Okay. Thank you.

THE COURT: You may call your next witness, Mr. Rothschild.

MR. ROTHSCHILD: I'd like to call Justin Hornick, please.

THE COURT: Mr. Hornick.

There he is.

JUSTIN HORNICK,

the witness hereinbefore named, being first duly cautioned and sworn or affirmed to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

THE COURT: We can't hear you for some reason, Mr. Hornick. You're not muted according to my screen, but we can't hear you. Now it says you're muted. Now it says you're unmuted.

MR. HORNICK: Can you hear me now?

THE COURT: Yes. Thank you.

MR. HORNICK: Okay. Sorry about that.

THE COURT: You may proceed, Mr. Rothschild.

MR. ROTHSCHILD: Thank you.

DIRECT EXAMINATION

BY MR. ROTHSCHILD:

Q. Mr. Hornick, what is your experience or educational background, please?

A. My education, I have a degree in biology and biochemistry from St. Francis University in Loretto, Pennsylvania.

THE COURT: Mr. Hornick. Excuse me. Speak up as well as you can. You're a little difficult to hear for some reason?

MR. HORNICK: I got a new computer. I'm sorry. Can you hear me now?

THE COURT: That's better?

MR. HORNICK: Okay, I'll get close to the monitor. Yeah. I have a science background and, out of school -- I graduated St. Francis in '94 and started doing medical sales, pharmaceutical and working for neurologists and then I came into the business. My father had been 25 years in the snack food industry, and he had bought this company with some partners in '97 and, you know, the family business was supposed to be a great opportunity, so I actually quit a pretty lucrative job to come down here and work with my father and his partners. And when I started in there, because they had grown really rapidly with ConAgra but they needed a quality control person full time, and I kind of took that role over because of my science background.

And I was involved in production and sales and marketing and everything with the company, everything in regards to running the company, from operations to quality control, new product development, basically everything within the company. And I have been here now, it will be 24 years in February.

Q. Thank you, you say the company. Tell me, what is your company?

A. The company is -- our branded name is Stonehedge

Farms, business name is Popcorn Alley Snacks. We operate as Stonehedge Farms, and we are a ready-to-eat carmel corn manufacturer in Delaware, Pennsylvania. We do all --

THE COURT REPORTER: Excuse me, sir.

MR. HORNICK: Yes.

THE COURT REPORTER: Could you speak maybe a little bit more slowly and also more clearly. I'm having a hard time understanding you.

THE COURT: That's the reporter, Mr. Hornick. So the reporter needs to hear you and understand you.

MR. HORNICK: I talk fast, so --

THE COURT: Slow down a bit and speak up.

MR. HORNICK: Okay.

Q. BY MR. ROTHSCHILD: Again, where are you located?

A. We are in Dover, Pennsylvania.

Q. And what are your products at Popcorn Alley?

A. We do all ready-to-eat candy-coated popcorn, carmel corn, kettle corn, butter toffees, with inclusions, without inclusions, nuts and all different degrees of quality, you know, from real lightly coated product do very heavily coated product.

Q. And who are your major customers?

A. At the moment, we sell direct to retail trades, Big Lots, Wegmans, Weis Markets, Shoprite in Jersey. We do a lot of in-and-out sales, so I sell grocery stores and retail

trade stores all over the United States. We do some export business and then we also -- I do a lot of co-packing and private label. So I'll co-pack for -- right now, Utz is a huge co-packer of mine, Herr's potato chips, Brimhall Foods in Tennessee and a lot of chocolate companies and corporate gift giving type people, we will do stuff for them and their brands.

Q. How did you first come to know Christopher Lindley?

A. I can't remember how we actually met. It might have been at a trade show or a referral. We were -- probably ConAgra. Actually, we were a ConAgra co-packer for many years, we did the Orville Redenbacher brand nationally, and we did the Act II Golden Valley brand nationally, and I know Chris was affiliated with that. So we might have -- if I had known him at that time, that's how we -- we were their co-packers, their east coast provider for all their manufacturing.

THE COURT: Be sure and don't speak too rapidly.

Q. BY MR. ROTHSCHILD: And do you do chocolate drizzling in your plant?

A. We do not.

Q. Do you do compound or real chocolate or both?

A. We do neither. We have done like a cocoa flavored, but I work with a lot of chocolate companies ourselves that we partner with. Joe was one of those for a long period of

time. And he had mentioned Toad-Ally Snacks. That was another partner of mine that does a lot of chocolate robing and chocolate drizzling, and I work with another probably 20 chocolate companies in the immediate area of Pennsylvania.

Q. And when you made orders for MFGPC -- at some point you came to be a co-packer for MFGPC; is that right?

A. Yes.

Q. And do you know what percentage of your business was MFGPC at any one time? Do you have any idea?

A. Chris was a pretty large -- I couldn't say a percentage. He was probably pretty low. We are a pretty large producer, and I have a hard time putting a percentage on it. Ten percent, maybe, 5 percent.

Q. And did you have excess capacity so that if he gave you additional orders, jumped his volume significantly over the years, that you would have the capacity to make more for him?

A. Yes.

Q. On a grand scale, like, you know, you could have jumped 10 percent more or 20 times more or just give me a ball park.

A. A hundred times more. I mean, we're a very large producer, a co-packer. It really just came down to planning. I couldn't, you know, turn the light switch on tomorrow and run, you know, $20 million for Wal-Mart in a

week, but we filled the pipelines for the Wal-Marts, Targets, Sam's Clubs, Costcos, BJ, Krogers of the world several time, for other people as well.

Q. So adding, say, 25 or 30 percent on the business that you did for Chris before would not have been a problem at all?

A. No. We would need a little bit of planning and lead time, but it's more of a labor component than it was, you know, capacity with the plant. It was more just running more shifts, extra shifts, things like that.

Q. And I want to ask you about margins. You said it's more of a labor thing, so if you do a larger run, does the margin go up or down?

A. Yeah. There's definitely savings, obviously, with long runs. Obviously there's a clean up, so when you're doing consistent product for a long period of time, the margin gets a little better. There's efficiencies obviously, packaging changeovers. Clean up's a big one for our business because carmel corn popcorn is really messy, so running for, you know, 15 hours straight and having to clean up is a lot bitter than running two hours and having to clean up.

Q. I understand. How was your relationship with MFGPC? When did you first start doing Mrs. Fields popcorn?

A. It was good. As far as the relationship, I have to

see when we first started with Chris. I can't recollect off the top of my head. It was awhile though. I mean, we have been a packer for him for quite some time.

Q. Did he pay his invoices on time?

A. Always, yes.

Q. And what would you do if you had a customer that didn't pay your invoice on time next time you got an order from him?

A. We'd make them -- that's our policy now if someone didn't pay us or was really late, we would probably make them pay in advance.

Q. Did you ever have any discussions regarding partnering with MFGPC or owning part of MFGPC or credit with MFGPC to expand the business?

A. Yeah. We had discussions about that.

Q. What were they?

A. Partnering up for a number of reasons; just for opportunity, to work with the brand, to grow it. We were kind of -- you know, the brand had gone really well with ours. I mean our brand is -- we were disgorge kind of plain carmel corns, peanut butter toffee, so Mrs. Fields was kind of that brand name and that indulgent -- was kind of -- was something that we didn't really have so, you know, and the export business, you know, we were -- we are a pretty large exporter, so there was a huge interest in the export

business. We export -- we have exported to probably about 21 countries, and we still export to this day. We were exporter of the year, for (unintelligible) Pennsylvania twice, and we won their Agro 2000 award as well, so there was some really interest in the export component for the Mrs. Fields brand.

Q. And you -- so what happened to those discussions? And I'm assuming that they never actually resulted in anything?

A. No. I mean we never -- it was always kind of on the table. We were always -- you know, we were always kind of looking at the next step ahead which was mainly just the promotional and in-and-out sales and, you know, I was really heavily involved with Chris on the packaging and product development side.

Q. Tell me about that. What did you do?

A. I mean, Chris had the formulation, but there was constantly -- I mean, the market had changed a lot, too. Costing is always a factor, I mean, with everything in the food business, from packaging changes to, during that time period I remember like ethanol went crazy that one year, I can't remember what year that was. I want to say, like, 2008 or '9, like the ethanol went really crazy in our corn, and corn syrup costs really skyrocketed, so there was always looking at, like, new sizes, new inclusions, holiday items.

So that was the kind of things we'd throw together as far as samples, different packaging sizes. One of our strengths, we had a lot of flexibility, so we were in, we did several items for Chris. We did a lot of bag items for him, full bags that went into boxes that we repacked. For some of the mass markets, we were looking at doing bigger bags and boxes and barrels, and I actually found one here that we did, like Mrs. Fields, like, barrels like these. This was in my archive. I clean my office out probably like, you know, once a quarter, and this is some stuff I still had.

And we did several sizes of barrels for Mrs. Fields because every concentrate is kind of different, so we would experiment and try different things depending on what the buyer wanted, was looking for, you know. There was always inclusions, cranberries, nuts, and that doesn't even include what he did on the chocolate side with (unintelligible).

THE COURT REPORTER: Excuse me, sir. I didn't understand what you just said.

MR. HORNICK: I said: That didn't include like with the chocolate side of the business. I was just -- I supplied product for him to send to the chocolate companies, and we would do inclusions, so a lot of our products for Chris were from the butter toffee base formula, so we would add inclusions, whether it be specific nuts. We did a

macadamia product. We did a cashew almond product. I would develop those with Chris, you know, that he would, then market and whatever case pack was appropriate for the specific retailer.
Q. BY MR. ROTHSCHILD: You mentioned buyers, what the buyers wanted. Did you have a sense of MFGPC's relationship with the buyers in the trade?
A. Yeah. Yes. I mean -- I mean, we ran in similar circles with customers. Chris had, from his experience with ConAgra and his other one, Fisher, had had contact with a lot of club industry, the drug trade, specific retailers. Yeah. Even some Dollar business. But, I mean, it seemed like he was doing more like kind of the drug trade and a lot of the club business.
Q. When you say drug trade, do you mean drug stores, just to be clear?
A. Yeah. Sorry, yeah, like CVS, Walgreens, Rite Aid, all those.
Q. Is it -- could MFGPC, if it had wanted to, gone to its buyer relations and sold a lot more popcorn?
A. Yes.
Q. Tell me about the category generally. Do a lot of new entrants come into the market each year?
A. Yes.
Q. And do they have a high success rate?

A. No.
Q. What's the success rate, in your experience?
A. I hate to say it's pretty low. I see -- I do the trade shows, some major trade shows every year, and every show I'll see hurting popcorn companies, and most of them won't be there the next year. The category has been growing, so you're seeing a lot more even recently. The category has been growing for several years.
Q. I mean, give me a time frame of that growth. I mean, how long has the growth been going in the category?
A. I would say the category has been growing, I mean, nonstop since -- it was still growing when I first got into the business in '98, but it got really crazy in the last probably, you know, 2008 on, I think. And the category is really unique. I mean, I was listening to the other testimony. I mean, you did see -- the market got flooded had with the skinny pop type items. Kettle corn got really big over that period. But you still see a large demand for indulgent products, there's no doubt. I mean, I feel like it's gone were one way or the other. In the popcorn category, it's either gotten very plain and simple or it's gotten really, really indulgent, which, you know, chocolate, inclusions.
I mean, we've just -- we've been really lucky. We make a really good quality product as far as our own brand,

and we do, you know, plain barrels, very competitive pricing on in-and-out. So I think we're one of the -- one of the few companies that really stay steady with really kind of the simple value-added product, but most of the category is really light and healthy or crazy indulgent.

Q. So -- and MFGPC's products were by and large on which part of the spectrum?

A. Indulgent.

Q. And was MFGPC positioned well to take advantage of that growth?

A. Yes.

Q. Why?

A. The brand name. The brand name. The quality of the product. The packaging was -- I felt was pretty innovative. He -- I mean, I thought they had a good marketplace with multiple items for, you know, multiple channels.

Q. And, I mean, in your estimation, was MFGPC's business alive and well at the time that he was terminated in 2014?

A. Yeah. It was growing. It was consistent.

Q. What are the trade terms when MFGPC gives you an order? When does it have to pay for it?

A. We normally will -- you know, we would fluctuate that if need be, but for the most part our terms are 30 --

net 30 days from time of shipment, 2 percent ten, cash payment or, you know, net 30.

Q. And he couldn't just buy popcorn from you and then say: I'll pay you when I get paid from my retailers.

A. We normally didn't do that. We normally wanted terms. We would have -- I'm trying to think in broad how we have dealt with other customers. We are pretty -- we are pretty strict on that. I mean, we have extended terms with customers for 45 or 60, even 90 with some customers. We try to avoid that at all costs. But Chris paid for a lot of his packaging, too, so that's a -- you know, we were just charging basically for the product itself and labor and that aspect. So packaging, the fact that Chris paid for his own packaging was a pretty big factor, I mean, for us at least.

Q. And if a customer over extended itself and makes a big order, doesn't pay for it on time, when it comes to you again the next time, what happens?

A. We would make them pay in advance on the next order.

Q. Have you seen many businesses that lasted as long as MFGPC, which, just for your reference, was 2003 all the way until it was terminated at the end of 2014. Have you seen any other popcorn companies last that long?

A. There's been a lot that have failed. I mean, most of the ones that have -- have been that long or longer. And

I work with a lot of popcorn companies as well. I mean, I hate to say, it's kind of a small world. Even some of my competitors I've co-packed for over the years in certain times. But it's -- there has been a lot of turn over in the popcorn industry, absolutely.

Q. And, you know, there's been some discussion in this case about sort of slow and steady versus, you know, trying to grow quickly. I mean, what's your judgment of whether just sort of being in the market is a -- without pushing for huge profits, is that a legitimate strategy that you see your customers engaging in?

A. Absolutely.

Q. Or you, yourself engaging in?

A. Myself, and I mean, I say that a lot about popcorn companies that have come and go over the years. Slow and steady is the rate. You know, it's tough with growth, from manufacturing to the marketing perspective, and, I mean, go to your brand. Unless you're throwing -- you know, if you go into every store immediately, I mean you'd have to throw so many millions of dollars, and it's risky. I mean, these retailers can discontinue your brand as fast as anything, but I think it's -- you know, the ones that last the longest, even like small guys to medium size co-packers that I personally know in the popcorn industry, it's slow steady growth.

You kind of have to go that way to be safe. It's like a snowball effect. One account helps you get another account helps you get another account, so it's just the class of the trade.

Q. And is there anything in your mind that would have prevented MFGPC from taking advantage of the growth in the market in the years after it was terminated, 2014, '15, '16?

A. No. I think it actually would have been better, to be honest, because I think the market has gotten really -- I mean from 2000 -- I mean from 2016, to now, the ready-to-eat category has really grown, I mean dramatically grown. I mean even, through Covid this last two years, we have still had record sales.

Q. And you would have continued doing business with Lindley on those terms or perhaps, if he had asked, maybe done some accommodation with him?

A. Yes.

Q. Okay.

I have nothing further for Mr. Hornick.

I appreciate you.

THE COURT: Thank you, Mr. Rothschild.

Mr. Amani, you may cross examine.

MR. AMANI: Very few questions, Your Honor.

CROSS EXAMINATION

BY MR. AMANI:

Q. Mr. Hornick describe if you would your understanding of why it's so difficult to survive in this business.

A. I'm sorry?

Q. Describe if you would your understanding of why it's so difficult to succeed in this business.

A. I think -- I guess the basis I would say is slow and steady. I think a lot of the new customers that come out don't have a -- they may have something new and different, but new and different doesn't always translate into longevity. That's why I say, a lot of these new popcorn companies have some, you know, I hate to say it's a gimmick, but they're pushing, like, fire popcorn or some kind of flavor. And, again, some of these people are not marketing people. There's a lot of start-up kind of operations that don't have any experience in the category, which I think is probably one of these factors.

I mean, most of these popcorn companies starting up, they are not -- they haven't been in the category long enough. I don't think they really realize the commitment, you know, and having the contacts and, you know, that kind of aspect of it. The costing. You have to be competitive manufacturing-wise as well as, you know, having the wares

for marketing and sales.
Q. You mentioned costing. Packaging is part of that costing, right?
A. Yes.
Q. And what did you -- and you -- and it's -- it sounds like you worked very interactively with Mr. Lindley on packaging?
A. Yes.
Q. You mentioned that he had multiple items in multiple channels. Do you remember that?
A. Yes.
Q. What were you referring to? The multiple channels is reference to what?
A. Multiple -- when I say channels, you could have club business, retail, which would be grocery stores, the grocery store trade, which is huge, the drug trade, which is like Walgreens, CVS, Rite Aid. And then you can break down to C-Store, and within that, that can be broken down into wholesale markets with C-Stores as well. That's basically the biggest group that we kind of dabble in, Chris did and myself.
Q. So he was in several groups?
A. Yeah. I mean --
Q. When you say channels?
A. I mean, a lot of our business, you know, there's

just two ways, there's either on the shelf, slotted into these marketplaces. Kind of sometimes the easiest, most cost competitive is just try to do promotion sales. So that's a safer bet. It's a nice volume. It's not as consistent always. You get the ups and the downs. We still do that way because the slotting game is really dangerous. It's a lot of money for what you might get out of it, so we tend to do more promotion type sales, which is really good. I mean, you get your nice shots in the arm with different chains, you get orders, and it can be big, very big.

Q. Did you work with MFGPC on promotional items?

A. From what I remember, I think that's a little bit more what we were doing was kind of like in and out with CVS, in and out with certain chains. I think Chris was big with Kroger. I can't remember. But the drug trade -- I'm sorry, the drug trades -- the club business is always, you know, one we tried to pursue.

Q. And you would help him out in those efforts with what, with product development and packaging?

A. Yeah. I mean -- I mean, Chris had a base formula already put together that we, you know, we tested run, so a lot of it really came down to more inclusions, things we added into it to make it, you know, something like -- I remember we did cranberry. Like for Christmas in-and-out promotions, we did like a Peppermint bark that was mixed in.

We did a cinnamon, I believe. It was more about inclusions.

But then he took it, you know, past that, where I would just supply bulk and then the gentleman who was just testifying or they would do chocolate and, you know, add to it. The chocolate was a pretty big piece, from what I remember.

Q. That was the product formulation side. What about these promotions on the packaging? Was there efforts that had to be made with respect to the packaging?

A. There's always -- like I said, I can't remember off the top of my head how often we needed to change things. I know now packaging changes with the FDA, it's a never ending cycle. We have changed all our packaging here internally with our own stuff probably four times in the last three years, just because you have to add sugars and then you have to add, you know, some other disclaimers, so packaging changes are never ending in the food industry, which is part of the business.

Q. And that's the labeling that you're referring to, right?

A. Yes, labeling which could be -- so, like we would label barrels would be one component. Film is a pretty big investment, you know, and plate changes, things like that, so, you know, I would say any new flavor you do or any change, if there's art and plate change costs film costs and

all that.

MR. AMANI: I don't think I have anything further, Your Honor.

THE COURT: Thank you.

Mr. Rothschild, anything else?

MR. ROTHSCHILD: Yes. Just briefly.

REDIRECT EXAMINATION

BY MR. ROTHSCHILD:

Q. You were talking about packaging. Do you include the cost of, for instance, like making the packaging, the plastic or the box or paper, or whatever in part of your cost of goods sold?

A. Yes. Yes. So like with our stuff personally -- and there were some items we had done for Chris like the barrels, it would vary by project to be honest with you. I mean, if it was something that we were already buying, that we were buying in big volume and there was a savings there, then we would include it. I do it for my customers now. I would include the packaging already. But if it was something custom or something that's not -- out of my scope, if I don't feel like I can buy efficiently enough doing it, then I just have the customer buy it.

Q. But let me ask you about that, versus a packaging redesign, like every five or six years, you're going with a different type of look or program. That's something that

gets amortized over a much longer period. It's not part of cost of goods sold, or is it?

A. That's something like a cost we fix right there. The film and everything is cost of goods, but obviously, like plate changes, that's kind of like an initial cost. We don't really amortize it. It's just kind of -- it's just an up front cost you have to pay like changes or something you have to deal with for labels or bags.

Q. So, you know, making a minor, you know, FDA ingredient label change versus an entire packaging program change, is that sort of a distinction there that you'd make?

A. Yeah, like a formula. Yeah. I mean I don't think -- it's not really changing the whole brand or something like that. It's just -- it's like -- it's plate changes, you know, on a label or on a bag. It's not like redesigning the entire package. It's just things you might have to change on it, like the sugar.

Q. And is that -- is that, you know, a really significant cost when you make a smaller change like that, or is it -- I mean, is it equivalent to, you know, like a redesigned package program?

A. No. I mean, it's a minor cost. I mean, plates aren't super expensive crazy, I mean, especially when you're going after some pretty large volume.

Q. Okay. Thank you, Mr. Hornick.

I have nothing further.

MR. AMANI: One follow up?

THE COURT: Yeah. Go ahead.

RECROSS EXAMINATION,

BY MR. AMINI:

Q. I just need you to clarify something for me, Mr. Hornick. These packaging costs, those are in the costs of goods sold you were talking about. Those are your -- these are for your products or for Mrs. Fields' products?

A. It's definitely my products. The stuff we did for Mrs. Fields, like I said, I remember Chris purchasing almost all of his own packaging unless -- like I said, unless there was something -- I remember we went to a barrel program, and it was a barrel that I bought a lot of, so it made more sense -- I mean, the packaging was still included in it, but it was like that was one piece where I would say, okay, the cost is going to include the barrel, the product, the lid, but you would pay for the label. Like we would do -- we did that on a couple of things, so it would vary by the item. So Chris would do a lot of bags and stuff, too, so he pretty much bought all the packaging as I remember.

MR. AMANI: Thank you.

THE COURT: Do you want to ask anything about that, Mr. Rothschild?

MR. ROTHSCHILD: No. Thank you, Your Honor.

Thank you, Mr. Hornick.

THE COURT: Thank you, Mr. Hornick. You may be excused.

MR. HORNICK: Thank you, Your Honor.

THE COURT: Okay, rather than start a new witness right now, we'll take a recess until about 10:20 mountain time. For today we will go from there 'til about noon and take a 30-minute or so and then go 'til two. All right? We'll be in recess until 10:20 mountain time.

(Short break.)

* * *

(Proceedings without the court reporter)

* * *

THE COURT: Mr. Rothschild, you may call your next witness.

MS. WHITE: Your Honor, I will be calling the next witness, and we will be calling Mr. Patrick Kilbourne to the stand.

THE COURT: I'll ask him to be sworn.

Thank you, Ms. white.

PATRICK KILBOURNE,

the witness hereinbefore named, being first duly cautioned and sworn or affirmed to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

THE COURT: Thank you.

You may proceed, Ms. white.

DIRECT EXAMINATION

BY MS. WHITE:

Q. Mr. Kilbourne, would you please describe for us your educational background.

A. Sure. I have an MBA from the University of Pennsylvania, Wharton School of Business. I have a master's degree in accounting from Brigham Young University, and I have a bachelor's degree in accounting also from Brigham Young University.

Q. Okay. And where do you currently work?

A. Berkeley Research Group.

Q. Okay. How long have you been with Berkeley Research Group?

A. About ten years.

Q. And what is your role there?

A. I'm a managing director.

Q. How would you characterize your professional work?

A. My professional work I do damage analyses, lost profit calculations, forensic accounting investigations and some consulting work as well.

Q. About how long have you been in this profession?

A. About 26 years.

Q. Would you tell us a little bit about your

professional credentials, please.
A. Yes. I'm a CPA, certified public accountants, I'm a certified management accountants, a certified fraud examiner. I'm certified in financial forensics. I'm a chartered global management accountants and I am accredited in business valuation.
Q. Have you previously provided expert testimony in litigation or arbitrations?
A. Yes. Many times.
Q. Okay. How often have you performed a damages analysis?
A. Many, many times, probably several hundred.
Q. Okay. And did any of those damage analyses ever involve the calculation of lost profits?
A. Yes, frequently.
Q. And do you have a sense of how many times you have done that type of calculation?
A. I've probably done lost profit calculations, again, in the hundreds of times.
Q. How often have you been retained to provide a damage analysis in a case involving a license agreement?
A. Quite a few times. That's very common in my work is that my lost profits or damage analyses are based on license agreements.
THE COURT: Just a second. We're having trouble

finding the court reporter on the attendees, and that's a problem.

MS. WHITE: Oh.

THE COURT: Becky, are you on? Can you hear us? She's also working remotely right now.

MS. WHITE: She is an essential part of this.

THE COURT: Yes.

MS. WHITE: I don't see her on line.

THE COURT: There she is. Becky?

* * *

(Court reporter present.)

* * *

THE COURT REPORTER: Sorry, Judge, my internet just went out, so --

THE COURT: Did you hear any of this witness' testimony?

THE COURT REPORTER: I did not. I'm so sorry.

THE COURT: Well, once again, the old gizmo adage prevails. If anything can go wrong with it, it will.

I'm sorry, Ms. white. Well, we swore the witness, Becky. Did you hear that?

THE COURT REPORTER: I did not, but --

THE COURT: He was given the oath and he said he would tell the truth.

I'm sorry, Ms. White. You better quickly go over

again what you have just gone over.

MS. WHITE: That's fine, Your Honor. We don't mind.

Q. BY MS. WHITE: All right. Mr. Kilbourne, would you please describe for us your educational background?

A. Yes. I have an MBA from the University of Pennsylvania, Wharton School of Business. I have a master's degree in accounting from Brigham Young University and a bachelor's degree in accounting also from Brigham Young University.

Q. Okay. And tell us, where do you currently work?

A. Berkeley Research Group.

Q. Okay. And how long have you been with them?

A. About ten years.

Q. All right. And what is your -- what is your role there?

A. I'm a managing director.

Q. How would you characterize your professional work?

A. My work is, I do damage analyses, lost profits calculations, forensic accounting work and some consulting work.

Q. How long have you been working in this profession?

A. About 26 years.

Q. Could you tell us a little bit about your professional credentials?

A. Yes. I'm a CPA, certified public accountants. I'm also a certified management accountants, a certified fraud examiner. I'm certified in financial forensics. I'm a chartered global management accountants, and I'm accredited in business valuation.

Q. Okay. How many times, previously, have you provided expert testimony in litigation or in arbitration?

A. I have probably testified around a hundred times.

Q. Okay. And how often have you performed a damages analysis as an expert?

A. Many more than that, probably a couple hundred times.

Q. Okay. And did any of those damage analyses ever involve the calculation of lost profits?

A. Yes. I would say a significant portion of them.

Q. Okay. And with those same damages analyses, how many of them involved, you know, a license agreement?

A. A significant portion. Often my lost profit or damage calculations are related to license agreements, so I don't have a number, but many of them.

Q. And how often did they involve intellectual property, like a trademark?

A. Similar number. I mean, usually if you've got a license, you have some sort of intellectual property underlying that.

Q. Now, you were asked to provide testimony in this case (unintelligible). Tell us more specifically what you were asked to do in this matter.

THE COURT: We lost part of that question somehow, Ms. White.

MS. WHITE: All right. I will shorten it.

Q. By MS. WHITE: Mr. Kilbourne, would you please tell us what you were asked to do in this matter?

A. Yes. I was asked to calculate MFGPC's lost profits for the time that was set by the Court, which was December, 2014 through April of 2018.

Q. And those were lost profits as a result of the termination of the trademark license with Mrs. Fields?

A. Yes.

Q. Let's talk a little bit about the data that you relied on for purposes of your opinion. Are you aware that the District Court, at one point in this case, made a determination regarding the type of evidence that would be relevant for purposes of calculating damages?

A. Yes.

Q. Okay. And that, among other things, the District Court stated that MFGPC'S sales data, it's own financial data, excluding the period of the great recession, and the period affected by their co-packer's fire, is highly relevant to calculating MFGPC'S damages; is that correct?

A. Yes.
Q. Do you agree with this?
A. I do. Yes.
Q. Okay, could you tell us why?
A. Well, oftentimes when we're doing lost profit analyses we're trying to forecast, and we use the historical data of the company as a -- as a -- to provide information of what would happen in the future.
Q. Okay. And so did you end up relying on this data in your analysis?
A. Yes, I did.
Q. Now, are you aware that the district Court also determined that another license, involving a third party named Perfect Snacks, may also be relevant to the determination of damages in this case?
A. Yes.
Q. Okay. And do you agree with that?
A. I do agree with that. Yes.
Q. Okay, and could you tell us why?
A. Yes. So, one of the central things we're doing in looking at markets or valuation or lost profits is trying to find comparable situations, so I think that having another license, the Perfect Snacks' license, is highly probative because it's a license for the same product, and not just the same product, but the exact same branded product of

using Mrs. Fields' name, so it's a -- really it's a remarkably good comparison point to use to predict what MFGPC would have done.

Q. Okay. I should ask, just by way of background, you looked at the Perfect Snacks' license; is that correct?

A. Yes.

Q. Okay. And are there differences between the license that MFGPC had and the Perfect Snacks' license?

A. Yes, there are.

Q. Okay. And did you have to compensate for those differences?

A. Yeah. So I considered them. I mean, I didn't make an adjustment, but generally speaking, in my view, the Perfect Snacks' license agreement is less valuable than MFGPC'S for a number of reasons, so I didn't make any downward adjustments, but I noted that the Perfect Snacks' license agreement was less valuable than MFGPC'S.

Q. Okay. Now, was the Perfect Snacks -- was the period of time for the Perfect Snacks' license, was that similar to the damages period that you were asked to calculate?

A. Almost exactly. The Perfect Snacks' license agreement was for three years and three months, and the damage period set by the Court was three years and four months.

Q. Are there any other reasons you found it to be a helpful data point for you in your analysis?
A. Just the fact that it's, again, you know, same product. Both are for -- both are for Mrs. Fields' branded name, a similar period. It's just -- again, you rarely see a -- when you're looking at comparable license agreements, comparable license agreements in my work, you rarely see a comparison point as spot on as this one.
Q. And in your mind, did it help -- did it help you understand what Mrs. Fields -- how Mrs. Fields valued the license or how Perfect Snacks valued the license?
A. Sure, because you have two parties, one of them -- two independent parties, an arm's length transaction, one of them involved in this litigation, who are -- who are agreeing to value the Perfect Snacks' license agreement which, again, could then be compared to the MFGPC license agreement.
Q. So, did you end up using this data in your analysis?
A. Yes, I did.
Q. Are you aware that the District Court also determined that Mrs. Fields' sales of its own popcorn using the Mrs. Fields trademark during the damages period might be relevant to the analysis?
A. Yes.

Q. And did you find that -- and do you agree with that?
A. I do, yes.
Q. Okay. Did you end up using data regarding Mrs. Fields' own popcorn sales during the damages period?
A. I did not.
Q. Okay. And why not?
A. Well, Mrs. Fields produced some data around their sales, and I spent a considerable amount of time looking at it, but frankly it was either incomplete or incomprehensible or just wasn't reliable enough for me to be able to make any assessment of what they had provided.
Q. Were you able to glean anything from it? Was there -- was there -- were you able to use it in any way, shape or form?
A. I mean, I guess the extent of how I could use it is that it -- what was in there did show, I think it was the period of '15, '16 and '17, and during that period showed increasing sales by Mrs. Fields of popcorn. So, you could -- you could use that to say there was increasing volume, but the incomplete nature of it didn't allow me to really incorporate it fully into my analysis.
Q. What other documents or information did you rely on in preparing your report and your opinion?
A. Well, I looked at MFGPC'S company financial

statements, I looked at their QuickBooks file, which is an electronic file of all the transactions, so it has all the detail of everything over the period that we are dealing with. I looked at their tax returns. I looked at the Courts' rulings in this matter. We conducted market research on the ready-to-eat popcorn industry. I looked at royalty rate data for the industry. There were board of director reports that were produced by Mrs. Fields, and there were hundreds, maybe thousands of pages of business documents of both MFGPC and Mrs. Fields -- yeah, Mrs. Fields that I reviewed.

Q. All right. Let's take a moment now. I'd like to show you a demonstrative that you prepared, a little bit about -- a summary of your opinions at this point. And can you see that?

A. Yes.

Q. Okay. Could you tell us what is summarized here in this slide?

A. Yes. So I did three separate calculations of MFGPC'S lost profits, and those are summarized on this page, and they were included in my report. And the first row is, is my calculation of lost profits based on MFGPC'S historical sales. And, as a result of that, I calculated the lost profits were about $464,000. On the second row I did a second calculation of lost profits based on Perfect

Snacks' minimum sales and the license agreement between Perfect Snacks and Mrs. Fields, and that led me to a conclusion of lost profits for MFGPC of about $916,000. Then finally, based on the Perfect Snacks' license fee, I determined what I would call a minimum value of MFGPC'S license or lost profits was $425,000.

And then, in the next row over, which is titled Unpaid Invoices and Interest, there were two invoices that Mrs. Fields owed to MFGPC. I was asked to sum up those and to calculate interest through the date of my report, and obviously, as you can see, those amounts are the same for each of the three scenarios, so you combine those two totals, the lost profits in the total column are 577,000, a million 28 or 537,000.

Q. Let's start by talking a little bit about your determination of MFGPC'S lost profits based on its historical sales. Would you first explain to us your process for calculating lost profits using historical sales data?

A. Yes. There are really three fundamental inputs you need to calculate lost profits. One of those is the incremental profit margin during the damage period. Another is what the revenue is, and that has really two components, which is looking at the revenue as a baseline prior to the damage period and then the third is what you expect the

revenue growth to be during the damage period. So you would take the baseline, grow it during the damage period, get a total revenue during the damage period, multiply that by the incremental profit margin and that would lead you to the lost profits.

Q. Now, in estimating the incremental profit margin, do you use all costs when you do that?

A. You evaluate all costs, but you don't use all of them. And I can sort of walk through that process. I think we have a demonstrative if we could perhaps do that.

Q. Yes. The one that shows your conclusions. I was wondering, before you do that, can you tell me a little bit about why you wouldn't just use all costs to determine lost profits?

A. So, if you -- if you just think about a simplified income statement, you've got revenue is the top line and then the second, the line below revenue, is what's called cost of goods sold, and cost of goods sold are typically considered to be variable costs. What that means is that for each extra unit that you sell, what was the cost to produce or generate that? And in MFGPC'S case that, the cost of goods sold, was 25 percent. So their gross margin, which is revenue less cost of goods sold, was 25 percent.

Then below that you have overhead costs, and generally speaking overhead costs are considered to be fixed

costs in nature. And so a simplified way of calculating lost profits would be to take the revenue less the variable costs of goods sold. In this case you get to 25 percent. And then 25 percent was your incremental profits, and that would be how you calculate lost profits. But sometimes there are operating costs or at least overhead costs that can be variable in nature and so you look at each one of those, and you determine which of those may be variable, which are fixed and then get to the bottom, which is the incremental profit margin.

Q. And would you use the fixed costs in determining lost profits at the end of the day or the one-time costs?

A. No, you would not, because the fixed costs are incurred by the company regardless of whether or not an additional unit is sold and so it wouldn't be appropriate to include fixed costs when you're calculating lost profits.

Q. And the same goes for one-time or intermittent costs as well?

A. Yeah, which I would characterize those as broadly I would call all those fixed costs.

Q. So you've identified the core assumptions that you relied on, and that was the incremental profit percentage, baseline revenue, and the revenue growth, or the growth rate. Is that -- is that right?

A. Yes.

Q. And so what was the first step that you took after identifying those foundational assumptions?

A. So, again, the first step was to take revenue, so we're looking back historically for MFGPC, and I looked at 2003 through 2012, before the fire occurred, and you look at their revenue, any cost of goods sold, the variable costs and that led to a 25 percent gross margin percentage. Then I went through and looked at all of the overhead costs to determine which of those may be variable in nature. Again, generally speaking, you would expect those to be fixed in nature, but I went through all those and removed the -- the ones that were intermittent or fixed costs.

And first of all, I removed depreciation, amortization because those are -- those are not cash costs anyway, they are just accounting expenses that don't actually reflect an expenditure, reflect cash going out the door. I also removed interest. Most of the interest was paid to the owners of MFGPC, and those are not considered an operating cost so that's not part of their reduction you would make to get to your incremental cost percentage. There were also a number of small intermittent expenses and so you'd see a few hundred dollars in 2004 and then a few hundred dollars in 2010, several years later, so I removed those intermittent or one-time fixed costs.

I also removed -- there was -- there were

management fees that were accrued but not paid to Mr. Lindley or actually to Mr. Lindley's operating company, LHF I think is the acronym, which he's the full owner of, so it went to him. So, these were never paid to him, they were accrued. So there were an expense on the income statement, but, one, they weren't paid; and, two, it wouldn't be appropriate to have those because those are expenses that are going to Mr. Lindley.

And so, by way of example, let's just suppose we said that the incremental profit or the lost profit in a given period was -- or a given year was a hundred-thousand dollars, and we also had an expense, the payments to Lindley, a hundred-thousand dollars. If you include that full expense, then the lost profit would be zero, but Mr. Lindley was not -- that means he would not be paid that hundred-thousand dollars for his work and effort. It's more or less like an inter-company transfer. So, those were also removed.

And then, finally, there were a number of fixed or intermittent marketing expenses or kind of one-time packaging expenses, and I removed those as well. And after all -- after all was said and done, I had included 75 percent of the -- all of the cost of goods sold, the 75 percent, and an additional also 15 percent of overhead costs which I treated as variable. So the net amount was a 10

percent incremental profit margin as you're showing on the sheet that you've just pulled up.

Q. I was going to ask you, is this a summary of what -- of essentially what you have just described to us?

A. Yes. So this is a summary of MFGPC'S historical financial statements from 2003 to 2012, along with my adjustment for what I considered to be the -- the fixed costs which you wouldn't include. So revenue is a hundred percent, cost of goods sold, variable costs, is 75 percent, gets us to a gross profit of 25 percent. As I looked through all of the overhead costs, I determined that another 15 percent of those were -- were fixed in nature and so the incremental profit margin was 10 percent.

Q. Okay. I haven't asked you this yet, but you state you went through 2003 through 2012; is that correct? Is that the date range that you relied on?

A. Yes.

Q. And why did you stop at 2012?

A. Well, the fire at MFGPC'S packer occurred in 2013 and, as the Court in my estimation accurately observed, that data was not relevant because of that significant event. So I didn't use data that was affected by the fire, and in 2014, late 2014, Mrs. Fields terminated the license agreement, so obviously any data beyond that would be not relevant as well.

Q. And you took into account as well the 5 percent royalty that was owed to Mrs. Fields in all of this?
A. Yes. In all of this I assumed that part of the expense that MFGPC would incur would be paying 5 percent to Mrs. Fields.
Q. Okay. So that's taken care of in your analysis?
A. Yes.
Q. Okay. Did you have anything to turn to as a sort of reasonableness check for your 10 percent incremental profit margin?
A. Yes.
Q. And what was that?
A. Mrs. Fields' own data. Mrs. Fields prepared a report to their board directors in which they determined -- and this was contemporaneous. I believe it was in 2015. Maybe it was 2014 -- but a contemporaneous report where they projected that their incremental profit margin for confection sales, which includes, ready-to-eat popcorn, would be 9 percent. And so Mrs. Fields themselves determined that the incremental profit margin was 9 percent. My analysis was 10 percent. I thought that was a very good comparison when I see that Mrs. Fields is essentially agreeing with my conclusions.
Q. And so, just -- just -- I think this is evident, but I just want to be clear you didn't assume that all costs

were variable or all costs were fixed, right? You actually went in and determined what would most appropriately qualify as an incremental or fixed cost; is that right?
A. That's correct. I reviewed the expenses in detail, both in their financial statements, in the detail in the QuickBooks files and through conversations with Mr. Lindley about the operations and the nature of the expenses.
Q. And at the end of the day, in essence, you assumed that 90 percent of MFGPC'S overall costs were variable, right, and only 10 percent fixed?
A. Correct. And so what that means is that for every hundred dollars of revenue I assumed that MFGPC would have incurred $90 in costs, so $10 were their lost profits.
Q. Now, as part of that, as part of your analysis, you calculated sort of an average gross margin; is that right?
A. Yes.
Q. Okay. And was that a simple average or a weighted average?
A. It was a weighted average over all the years of MFGPC from 2003 through 2012.
Q. And would you help me understand, what is a weighted average and what is the difference between that and a simple average?
A. So, maybe an extreme but an illustrative example would be to say if you had -- in year 1, your revenue was

one dollar and your gross margin was 20 percent and then in year 2 your revenue was a million dollars and your gross margin was 30 percent, the simple average of those two years of 25 percent and 30 percent would be 25 percent. Obviously that would be wrong, not reflective of what happened because you only had -- you're counting the year -- a dollar and a million dollars as equal, so a weighted average takes the weight or amount of that one dollar and a million dollars.

And in my example the weighted average gross margin would be 30 percent or 2.999 something because the year with one dollar revenue would not have weight. If we apply to MFGPC, their revenue in the earlier years, 2003, their first year, was less than what it was in the later years, 2012, and so those early years would not have as much weight in that calculation.

Q. Okay. Now, you're familiar with the expert report that was submitted by Mrs. Fields' expert Grant Lyon in this case?

A. Yes.

Q. You had an opportunity to review that?

A. Yes.

Q. Okay. And do you recall in that report that Mr. Lyon opined that you had used a simple average to explain the average gross margins?

A. Yes.

Q. And was that wrong?
A. Yes. He was incorrect. I used a weighted average.
Q. All right. Mr. Lyon also noted in his report, he critiqued your use of MFGPC'S historical gross profits in your calculations, and he opined that you should have only used the gross profits one year, 2012, which was 17.5 percent. Do you recall that?
A. Yes.
Q. Okay. Do you agree with that?
A. I don't.
Q. And why wouldn't it be appropriate to use the gross profits from a single year?
A. Well, if we look at MFGPC'S gross profit margin over -- over the history of time, it's not consistent. There's quite a bit of variability. And Mr. Lyon's assumption is you can use one year of gross profits to predict all other future years, and if we look at their historical profits, the gross margin percentage, that's just not the case.
Q. I was going to ask if you want me to put this up?
A. Yes. So, let's look at this. You can see in 2012 the gross profit margin was 17.5 percent. That's the rate Mr. Lyon said he was going use. But, again, no one year here predicts all the other years. If we go back to 2003, the 35 percent profit margin in 2003 did not predict the

2004 margin of 29 percent. The 2005 profit margin of 44 percent did not predict that it would be only 7 percent in 2006 or any other year.

And so, if you -- Mr. Lyon's underlying assumption is you can pick one year and that will project the accurate forecast of all of the other years, and that's just simply never the case for MFGPC because their profit margin was up and down. And, given the fact of that inconsistency, in my view the best course of action is to use as much data as possible or to use all of the data. And using all these years, the weighted average gross profit rate was 25 percent.

Q. Let me ask you now about the information of the revenue during the damage period. How did you go about determining the appropriate revenue for the damages period?

A. So, as I mentioned before, the revenue has two components. One is the base period that you use to project into the projection period, and secondly, what's the growth rate? What's the expected growth of revenue year over year? And so I used -- as a base, I used the three years before the fire, 2010, 2011 and 2012, and the revenue during those periods was fairly similar, and the average of those three years was 590,000. So that was the base I used.

So then the question is, how much is that revenue going to grow year over year? And to make that

determination, I had two data sources. First of all, Mrs. Fields had contemporaneously made projections of what their confectionary, which includes ready-to-eat popcorn, what their revenue growth rates would be over that period of time, over the same period that I was trying to project. So they made the projections contemporaneously and their numbers were -- was 18.5 percent on average. And secondly, and probably even more importantly, we had historical data. So we found that historical research or research reports that showed that the actual revenue growth rate during the period that I was forecasting was 23.6 percent per year.

So this is really -- I mean, honestly, I was surprised to find data on such a narrow space as ready-to-eat popcorn, but we did. And so it was specific to ready-to-eat popcorn. And the actual historical growth was 23.5 -- 23.6 percent during the forecast period that I was making. And so, normally, when you're doing these types of analyses, you're usually forecasting in the future, but in this case we have the luxury that we're looking backwards and then forecasting during a historical period, and we have the actual revenue growth rate for the industry of ready-to-eat popcorn. Frankly, it's a remarkable and very valuable data point.

So what I did is I took the average of the actual historical growth rate of ready-to-eat popcorn and

Mrs. Fields' contemporaneous projections, and the average of those two was 21 percent. And so I increased revenue each year for MFGPC by 21 percent.

Q. Now I want to ask you a little bit about Mr. Lyon's report again. He criticized you for using Mrs. Fields' own forecasts and the actual industry growth rate for ready-to-eat popcorn during the damage period and instead used the U.S. inflation rate, which he opined was comparable to MFGPC'S growth rate from 2010 to 2012. Do you recall that?

A. Yes.

Q. And do you agree with that criticism?

A. No.

Q. Can you tell us why?

A. Multiple problems with what Mr. Lyon did. First of all, to get the historical data that he used of MFGPC was just two years of growth rates. And if he had used even one more year or if he had used all the years of data, his -- his growth rate would have been more than three times higher. But, more importantly, using the inflation rate here, he's saying: Here's the historical inflation rate.

Well, what we have is the actual growth in ready-to-eat popcorn sales and so there's really no reason to use a broad market inflation rate when you have the actual growth rate in revenue for ready-to-eat popcorn. It

really just doesn't make any sense at all.

Q. Now, Mr. Lyon also critiqued your decision to start at -- what was it, 590,000 as the baseline rate for your calculations instead of starting with MFGPC'S actual revenues from 2014. Do you agree with that?

A. No.

Q. Okay. Can you tell us why?

A. Well, again, the Court had said not to use the fire-impacted periods, and I agree with that. I mean, there's really no reason to use data from a period that's been impacted by some sort of significant event like that. And so, one, it doesn't comport with what the Court ruled, but also I think it's just wrong economically. And I agree with the Courts's assessment here. You wouldn't use a period that's been impacted by some sort of significant events, and you know, we see from the historical data of MFGPC that their sales are pretty scalable. And so they, based on, you know, their history, I would expect they would be able to recover from the fire and so there's no need to use those reduced sales.

I mean, we have a current kind of something current for all of us in the pandemic. You know, we all know that restaurant sales have been awful during the pandemic. There would be no basis to use restaurant sales for 2020 to project forward into what restaurants would do in the future

because of the significant event of the pandemic. Likewise, I don't think it's appropriate to use fire-impacted sales.

Q. So, using the actual industry growth rates and Mrs. Fields' own data, what were your conclusions with regard to MFGPC'S lost profits based on its historical data, sales data?

A. Yeah. So, again, we start with the base revenue of 590,000, project forward using the growth rate of actual industry sales, 21 percent. That gives you a revenue figure, and then I multiply that revenue figure during the damage period by 10 percent, which is what was MFGPC'S incremental profit margin, and that gives you lost profits of about $464,000.

Q. I'd like to ask you a few questions now about your calculation of MFGPC'S lost profits based on the information available in the Perfect Snacks' license agreement, if you recall that. Now, as we discussed before, the District Court, you know, concluded that this Perfect Snacks' license agreement may be highly relevant to calculating MFGPC'S damages. Why do you think that's the case?

A. Well, we talked about this a little bit before. It's a -- it's a license that is for the same product, ready-to-eat popcorn; the exact same branded product, Mrs. Fields' ready-to-eat popcorn. The license agreement for Perfect Snacks is for a similar period. There's a lot

of other similarities. As I mentioned before, there are some reasons why the Perfect Snacks' license agreement is not as valuable as the MFGPC license, but it's nonetheless very, very comparable.

Q. Now, was the Perfect Snacks' license a worldwide license?

A. No. The Perfect Snacks was U.S. only. MFGPC was a worldwide license. That's what makes the Perfect Snacks' license agreement less valuable.

Q. And was there anything else that stood out to you with regard to what made the Perfect Snacks' license less valuable?

A. Yeah. There were a number of other factors. The Perfect Snacks' license agreement was not exclusive. MFGPC'S was exclusive. The Perfect Snacks had limitations to certain retailers. MFGPC did not. The MFGPC license agreement automatically renewed. The Perfect Snacks' license agreement was for one period. Those are the ones that come to mind right away, those differences. And all of them, all those differences indicate that the Perfect Snacks' license agreement is less valuable than MFGPC's.

Q. Now, what data did you use from that Perfect Snacks' license to -- for the purposes of this calculation?

A. Well, the first analysis that I did was using the minimum sales that -- that Mrs. Fields and Perfect Snacks

had agreed to in the Perfect Snacks' license agreement.
Q. And how did you use those minimum sales in that agreement to estimate MFGPC'S lost profits?
A. So, here you have Mrs. Fields and Perfect Snacks saying -- and, by the way, the minimum sales for the license agreement was $8.5 million. So, they say during this three-year and three-month license agreement, they both expect that Perfect Snacks will sell at least $8.5 million in ready-to-eat popcorn. And so the way I used that is kind of the market comparison.
For Perfect Snacks, if both those parties expected Perfect Snacks could have done that, then MFGPC also could have done that. And so, in that second analysis that I did, I used that $8.5 million, adjusted it for the damage period, which was just a month longer, so 8 -- or just about $8.8 million and then multiplied that by the 10 percent incremental profit margin, which led me to a conclusion of about $916,000 in lost profits for MFGPC.
Q. Now, are you aware or were you eventually made away that Perfect Snacks did not actually generate 8.5 million in sales?
A. Yes.
Q. And were you provided that information prior to issuing your report?
A. Yes.

Q. Was that information that was available to you before your report, or was that information that came to you first in Mr. Lyon's rebuttal report?
A. No. I knew that when I submitted my report.
Q. Okay, what about the specific numbers? Did you get those before you issued your report?
A. No. I don't believe so.
Q. Okay. If you had had those specific numbers, would you have found them relevant or reliable, in your estimation?
A. Not really because I knew that the Perfect Snacks -- that Perfect Snacks had stopped selling ready-to-eat popcorn because of this litigation. And so I -- their actual sales would be less relevant in this case because they stopped selling popcorn and for an external reason. Moreover, you know, the -- the actual sales may not be as valuable as the projection because the projection is based or Mrs. Fields and Perfect Snacks saying: Here's what we think we can do.
Now, if Perfect Snacks had some sort of significant event, like the fire for MFGPC, then those expectations may not be realized, but I would want to use, you know, what the parties expected to have happen, not sales that are impacted by Perfect Snacks stopping selling because of litigation or any other significant events that may have caused them to

not achieve what both parties expected.

Q. Your Honor, at this time we would like to renew our motion in limine and exclude the evidence of Perfect Snacks' actual sales that was not produced until after the -- after discovery and after Mr. Kilbourne issued his first report. For the same reasons that we set forth in our original motion and for the additional reason that we believe the testimony elicited by witnesses so far in this case demonstrates that the information is unreliable, and it would be prejudicial to us, if it was allowed to be admitted at this point.

THE COURT: Mr. Amani?

MR. AMANI: Your Honor, they chose not to take any discovery from Perfect Snacks, but they got ahold of the discovery that we had at Mrs. Fields' in accordance with the Court's order. The Court initially said: Take a look at -- give them all the information to April 2018.

Let me put this in context for Your Honor as well. The Perfect Snacks contract was signed in September of 2017, and if they went to market in early '18, they got -- they actually had -- I think Mr. Kilbourne is mistaken. He had the actual numbers through the third quarter of 2018 when he did his report and then the fourth quarter and the first quarter -- the last quarter of 2018 and the first quarter of 2019. Yes. He got those numbers from the report of ours,

just the last two quarters.

But he already had. He had enough to do the analysis when he got the report to give you a rebuttal to it today. So he's had plenty of time to do it, and they could have called up and asked for it. And the only reason we put it in is because he says this company, which had $186,000 of sales in 2014 is going to do a million six in 2015 based on that Perfect Snacks, and that contract of his. Yet he knows at that point that, in the first year, the company comes nowhere -- even Perfect Snacks has come nowhere near to it. I think it's entirely irrelevant, and the Court should take it under consideration.

MS. WHITE: Your Honor, we moved to compel exactly this information. It is information that is within the damages period. It is information that we asked for in discovery. It is information, like other categories of information, that Mrs. Fields chose not to provide. And it is my impression, based on the briefing in the past, that at this point, it is just -- it remains unclear what is left that could be produced that would be, you know, at the last minute suddenly helpful to them. They knew all along the reason why we would want this information.

It was readily apparent to anyone who has worked for the damages expert before that the expert would want all available data regarding both projections and actual sales,

would want information regarding the numbers, and they intentionally excluded it. They intentionally withheld it until it was weaponized for us in their expert's rebuttal report. We think that is prejudicial and unfair, and as you've heard throughout this case, this evidence is of minimal value. There is all sorts of reasons why the actual sales of PSP at the end of the day aren't even the type of things an expert should rely on for those few months that they actually first started going to market with the litigation pending, with all of the other issues, with the fact that it turns out they were a terrible licensee who defaulted almost right off the bat, an event that never occurred for MFGPC.

So, at this point, we don't see any basis for allowing that evidence to be admitted.

THE COURT: As part of your argument, it arguably goes to weight. If it doesn't have any weight, what difference does it make if it gets admitted?

MS. WHITE: Well, we still think it's inappropriate for it to be admitted considering the mischief that has taken place throughout litigation in this case.

MR. AMANI: And I object to this comment. It's just not fair. Your Honor ruled that we give them certain information. We gave it. Then we got the report. Our guy looked at it, and said: He's going to this Perfect Snacks.

You should give him the later information.

And we did. We didn't do any mischief in that. We followed the Court's instructions. I'm sorry.

THE COURT: Ms. white.

MS. WHITE: It has been evident since this Court ruled that other license agreements entered into during the time frame and other popcorn sales during the damages period were relevant categories of discovery, I do you understand why Mrs. Fields believes that somehow that wasn't relevant and requested.

THE COURT: Well, they requested it. You didn't give it. The motion is granted.

MS. WHITE: Thank you, Your Honor.

Q. BY MS. WHITE: All right. Mr. Kilbourne, I'd like to turn to your opinion regarding MFGPC'S -- it's your third opinion, MFGPC'S lost profits and your calculation that was based on the minimum license fee in the Perfect Snacks agreement. Would you explain to us how the minimum license fee in that other license agreement is helpful to your analysis?

A. Sure. So, any time you have a license agreement, it's a mechanism to divide profits between the licensor and the licensee, the license agreement and the related royalty rates. That's what you're doing. You're dividing profits. And typically the licensee -- almost always the licensee

obtains more profits than the licensor. The licensor grants its intellectual property or other assets, and the licensee brings to bear its manufacturing, marketing, sales expertise and the work to get the product to market.

And in this case, what I did is I looked at that rate, and basically your -- this 425, which is the minimum license agreement, that was paid to Mrs. Fields, and she would expect that Perfect Snacks would have more than 425 as their -- as their -- as their profits. And this is actually borne out with industry research. There was a report from KPMG that looked at the split of profits between licensor and licensee. And they found that between 25 percent of the gross margin to 25 percent of the operating margin went to the licensor, and so 75 percent of those two ranges went to the licensee.

And certainly the Mrs. Fields' and Perfect Snacks' license agreement falls within that range, and so if Mrs. Fields values the license as 425, then I would expect that Perfect Snacks and MFGPC, as a surrogate, would value it at least at 425,000 as well. So it provides what I would view as a minimum value of MFGPC'S license.

MS. WHITE: (Unintelligible).

THE COURT: We didn't hear that, Ms. white we didn't hear the first part of that.

Q. BY MS. WHITE: So, does this -- does the minimum

license fee in Perfect Snacks' agreement provide you with sufficient information to calculate a reasonable approximation of MFGPC'S lost profits?

A. Well, again, I would view it as a minimum, and I think it's a valuable minimum. It doesn't provide, you know, the accuracy of what I think would be the actual sales, but it gives us a floor, if you will, of what MFGPC's lost profits are.

Q. Now, you were also asked to calculate interest on two unpaid invoices to Mrs. Fields or that Mrs. Fields owed MFGPC; is that correct?

A. Yes.

Q. Okay. And you calculated simple interest at 10 percent from the due date of each invoice?

A. Yes.

Q. Okay. And at least in your report, which was -- I think it was October, 20 of 2020, the total of those outstanding invoices plus interest was a little over 112,000; is that right?

A. Yes. That's correct.

Q. Now, did you prepare an updated calculation through trial for purposes of your testimony?

A. Yes.

Q. Okay. And did you include in that updated calculation the set off of royalties that were owed by MFGPC

to Mrs. Fields?
A. Yes.
Q. Now let me pull up the other one. I just want to show you a final slide and ask you if this is your updated calculation. Do you see that?
A. Yes.
Q. Okay. So do I now have an updated calculation through trial for purposes of your testimony for the -- I guess we'll call it the second column?
A. Yes. So, as you can see on this, the first column, the amounts are unchanged, but the second column, which is titled Unpaid Invoices Less Royalties and Interest, so, this is the two unpaid invoices that were due from Mrs. Fields to MFGPC, and it includes interest on those invoices through tomorrow, the end of trial. And then I subtracted from that the offsets of the royalties that were due, which I -- plus interest also at 10 percent, and I believe the amount of the royalties due plus interest through tomorrow was about $40,000, so the net of all that is 73,105.
Q. So this resulted in slightly adjusted total calculations for you; is that correct?
A. Correct. So, from what's in my report, it's about $40,000 less than what's in my report.
Q. Okay. Now, Mr. Kilbourne, I want to ask you a few more questions about some of the critiques that Mr. Lyon had

in his report. In your -- well, let me ask you first, did anything that Mr. Lyon say in his report in any way change any of your opinions?

A. No.

Q. What is your understanding of the value of the Mrs. Fields license according to Mr. Lyon?

A. He set the value of the MFGPC license with Mrs. Fields was zero, has no value.

Q. Do you believe it's reasonable to take the position that this license had no value to MFGPC?

A. No. No, I don't. I mean, to begin with, we have the Perfect Snacks' license agreement where Mrs. Fields said that license agreement, which again, as we talked about is comparable to the MFGPC license both in time period and the -- and many other ways, and Mrs. Fields says that to them it's worth 425. And so, we know that it's worth 425 to Mrs. Fields. It has to be worth more than that to Perfect Snacks. So, to say that a license would be worth nothing, I just don't see any -- any basis for doing that.

Q. Let's -- let me ask you a few questions about the assumptions that Mr. Lyon relied on to conclude that -- that the license was essentially of no value. One of his opinions was that MFGPC was under-capitalized and so it couldn't grow. Do you agree with this?

A. No, I don't.

Q. Okay. And why not?
A. Well Mr. -- Mr. Lindley at different points made decisions about how much he was willing to invest into -- into the company. But that doesn't mean that he couldn't have invested more or have obtained outside investments. I know that he was in the process of doing that. And so the fact that he may have put some self-imposed limitations on his investment, which perhaps limited how quickly MFGPC could grow, does not mean that it couldn't -- he couldn't get more capital and further grow the company.
Q. Now, Mr. Lyon relied on MFGPC'S revenues and profits after the fire in 2013 to rebut some of your opinions. Do you agree with this?
A. No.
Q. And why not? Why don't you find the financial information from MFGPC after the fire to be helpful?
A. Well, first of all, the Court specifically said don't use it. So that's a good reason. But also, the reason the Court said that is because the -- it's not as relevant because you have a significant event, and so looking at the operations of the company after a disastrous event, again, as I said before, would be akin to looking at -- at restaurant sales in 2020 during the pandemic and trying to use that to forecast into the future. I just don't think it's appropriate to do that.

Q. And Mr. Lyon also relied on MFGPC'S financial data from 2015, after the license was terminated. Do you agree with that?
A. Again, I don't. He didn't give a basis for doing that. I don't know why you'd use data for after the end of the license agreement.
Q. And Mr. Lyon accused you of excluding over 66 percent of the actual costs incurred by MFGPC from 2009 to 2012. Do you recall that?
A. Yes.
Q. Okay. And I'm assuming you disagree with that?
A. I disagree with it, and it's misleading.
Q. Okay. And can you explain to us a little bit why?
A. So, as I mentioned before, we have 75 percent of MFGPC's revenue was cost of goods sold. That's by far the most significant piece. And I treated all of that as variable, and so that reduces MFGPC'S lost profits. And then I looked at what's typically the overhead costs, which are typically considered to be fixed in nature, and Mr. Lyon was focusing in on those fixed costs, and that's where he gets his 66 percent figure, ignoring or excluding from that calculation the other -- you know, the other lion's share of all MFGPC'S costs.
Q. What about the costs that Mr. Lyon opined should be included were employee costs. Do you agree with that?

A. No, I don't.
Q. Okay. Could you tell us why?
A. All right. So, during -- during MFGPC'S operations, Mr. Lindley was the only employee. He was running the company. And so, if you include his costs as an employee cost, then -- I'll go back to the example I used earlier. Let's just suppose that the -- in a given period, MFGPC's lost profits, so we're kind of done with the whole calculation -- were a hundred-thousand dollars but that we didn't include salary paid to Mr. Lindley which was through a management fee to LHF, which then would have gone to Mr. Lindley.
So, if we suppose that this management fee or the salary would have been a hundred-thousand dollars, then you would conclude that MFGPC had no lost profits and then Mr. Lindley gets zero compensation. He didn't receive this salary, and so it's really an inter-company transfer. You have got to take out any salary or management fee or any other sort of fee that would have gone to the owner, otherwise you're going to kind of double ding the lost profits. So, you absolutely have to remove the management fee or salary costs going to Mr. Lindley, which was effectively all of the salary costs during operations from 2003 through 2012.
Q. And that's because --

THE COURT: Can't hear you, Ms. White.
Q. BY MS. WHITE: And that's because MFGPC never had any employees; is that right?
A. That's correct.
Q. And Mr. Lyon also took issue with your reliance on the PSP license, and he opined that what one company could do with a license agreement can not be imputed to another company. Do you agree with this?
A. I don't. I just don't understand how he would make that statement. What we do in markets in valuation in lost profit analyses is we look for comparable situations. You look for a comparable company, a comparable license. And to say that you can't look at a comparison, especially one as good as Perfect Snacks, it's really an out-of-bounds comment in my opinion.
Q. We've no further questions.
THE COURT: Thank you, Ms. White.
Mr. Amani you may cross examine.
MR. AMANI: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. AMANI:
Q. Good morning, Mr. Kilbourne.
A. Good morning.
Q. Mr. Kilbourne, let me ask, as I understand it you were hired -- let me see if this is correct. This is page

20 of your report. You were hired to calculate MFGPC'S damages from December, 2014 to April, 2018, right?
A. Yes.
Q. And you recognize that Mr. Lindley was terminated on December, I think, 24, 2014, correct?
A. That's my understanding, yes.
Q. So, really, the period would have been beginning of January, 2015, through the end of -- April 30, 2018. By December 24, 2014 they had no sales going on for the rest of the year if they are not already in place. Would you agree with that?
A. So, I started my calculation on January 1. I didn't use that stop period of 2014.
Q. Good, and my understanding is you determined that those damages consist of MFGPC'S lost profits from sales to Mrs. Fields and all other parties? I'm reading from paragraph 22 of your report.
A. Do you mind if I pull up my report, or do you want to show it to me?
Q. No. I can put it up.
John, why don't you put up Mr. Kilbourne's report, page 9. It's Exhibit 60 page 9. Go back to page 9 of his report. It's paragraph 22.
A. Yes. I see that.
Q. And besides the -- the -- what I would call the

invoices, this was the only task you had to do was to figure out their lost profits, correct?
A. I think that's fair, yes.
Q. And we're talking about lost profits from the sale of Mrs. Fields' goods, correct?
A. Lost profits to Mrs. Fields?
Q. No. The lost profits that MFGPC suffered in connection with selling Mrs. Fields' products?
A. Yes.
Q. And -- and if you go back with me to page 2.
Would you go back to page 2, please.
You state that the way you went about doing that -- if you look at the second paragraph, paragraph 2 on that page, the way you went about calculating that was you utilized what's called conventional methodologies in your analysis to calculate those lost profits of MFGPC from January 1, 2015 to April 30, 2018; is that right?
A. Yes.
Q. And when you refer to conventional methodology for doing that, what are you referring to?
A. I would say all of the analysis in my report.
Q. Any particular methodologies you were relying on?
A. No. I mean everything that's detailed in my report.
Q. And then you state that your opinions are given

with a reasonable degree of professional certainly. Do you see that?
A. Yes.
Q. You're certain -- as the professional you are, you're reasonably certain that what you predict is going to happen, be true?
A. Yes.
Q. Is a reasonable prediction of what's going to happen. Okay. And let me go to your first table. Table 1.
It's the first -- table 1 is on page 15. There it is?
And let me focus you on that. You went over this with Ms. White, but the sum total of your opinion, in terms of numbers, is contained in this table, correct?
A. Yes, with the exception of the update that we just talked about.
Q. You corrected me. You're right. The unpaid invoices you corrected, and we saw that, and we'll come back to it. But that number is on the order of 73 thousand or some such thing now, correct?
A. Yes.
Q. But these are the only damages you're opining on. You don't have any other damages that you are opining on in this case?
A. No.

Q. Okay. And the starting point, if I'm not mistaken, if -- according to what you've said is -- was MFGPC'S lost profits based on MFGPC's historical sales; is that right?
A. That's true for one of three methodologies I used, yes.
Q. And that was the first methodology you used?
A. Yes.
Q. And what you do -- is it fair to state that more often than not, if you have a history of sales of an existing company you're trying to project into the future, that is probably one of the most valuable resources, correct?
A. Well, it's a -- I don't know that I would say the most valuable, but more valuable than historical would be actual data. So, in this instance, where we have actual revenue growth rates for the industry, that's more valuable than historical growth rates.
Q. Revenue rates for the industry are more valuable, you're saying, than the 12 or 13 years of actual growth that you have for this company?
A. Yes, because the industry data is specific to the damage period, whereas historical data is not the same as the damage period, so it's another example. If I were looking at, you know, what happened during the damage period, and we know what happened in the industry, that's

more valuable than what happened in some historical period that precedes the damage period or, for that matter, what was after the damage period.

Q. So when it came to growth rates, you're not really relying on MFGPC'S historical data, are you?

A. No.

Q. In fact, there is none of MFGPC'S actual data used by you in determining the growth rate?

A. That's not true.

Q. What did you use to determine just the growth, the rate of growth of sales? What did you use of MFGPC'S to determine the rate of growth from its historical sales?

A. The actual sales from 2010 to 2012 is the baseline, so that's the base point to use before you apply the actual industry growth rate during the damage period.

Q. Right. That's exactly right. So you have two elements on the sales side. You have the rate of growth and the baseline, right?

A. Yes.

Q. And once you have those two, you project it. And my question to you, sir -- I'm sorry. I think you misunderstood. When it comes to the rate of growth, your rate of growth has nothing to do with MFGPC'S historical rate of growth?

A. Well, using -- specific to the rate of growth, you

are correct. I used the actualized growth rate. But in getting to the numbers, you have to use MFGPC'S historical rate of sales from 2010 through 2012.

Q. That's for your baseline. That's for you're starting year, correct?

A. Yes.

Q. Your baseline starting year in this case is 2014. You're going to start in 2014 and then you're going to look forward and see how much can you grow to 2018, April 30, 2018, right?

A. No. You don't start with 2014 because that's -- that was -- that's not as reflective because of the other incidents, including the fire.

Q. You know, that raises an interesting thing. You keep saying 2014 and the fire. Were you here for Mr. Lindley's testimony?

A. I was not.

Q. Mr. Lindley testified that by the third quarter of 2013, he had recovered from the fire and was back in business. Did you know that?

A. I don't know that he said he had recovered from the fire.

Q. No. I'm telling you, based on the testimony he has given for which you weren't here, he said in 2013 he was -- by the end of 2013, he was recovered and he was going

forward in 2014, the fire was no longer of impact to his business. Did you not understand that?

MS. WHITE: Objection, Your Honor. Misstates prior witness testimony.

MR. AMANI: I don't believe it does, Your Honor.

MS. WHITE: I don't believe the witness testified that he had fully recovered.

THE COURT: Well, I'm trying to remember. He did say something about that, and I'm trying to remember the exact time frame and whether he was fully revenue covered or not. What is it you want to ask him, Mr. Amani?

MR. AMANI: Well, I'm going to get to the -- whether that was considered.

Q. BY MR. AMANI: He said -- I'll break it up for you. The fire prevented this one company, Gabes, from making popcorn for him for six months, so it was shut down. And we had Gabes' principal here today. He said he was shut down and after six months he could make popcorn, so that takes us into June of 2013. Did you understand that?

A. I did not hear -- was it Mr. Gabes? Is that who you said?

Q. I don't remember his same. Joe Scavitto. That's right. Joe Scavitto was from Gabes if I am not mistaken. Yes.

A. I did not hear his testimony, but even if he was

able to produce the middle of 2013, that doesn't mean that there's no remaining impact from the fire in 2014.

Q. And Mr. Lindley testified that he was back to selling by the end of the summer of 2013. He was back to selling his product. He had resources on which to produce product, and there was nothing that prevented him at that point from making whatever sales he thought were necessary. Did you not understand that?

A. Well, he --

MS. WHITE: Objection. Misstates prior witness testimony.

MR. AMANI: I don't have a transcript, Your Honor.

THE COURT: Do you have the quotations, Mr. Amani? We can argue all day about what he said. Why don't you ask him what you want him to --

Q. What was --

THE COURT: -- answer.

MR. AMANI: I'm sorry, Your Honor.

Q. BY MR. AMANI: What was the impact of the fire on 2014 sales for Mr. Lindley if you know?

A. Yeah. Well, my understanding from my conversations with Mr. Lindley is that he had not fully recovered from the impact of the fire in 2014.

Q. And why not? Why did he tell you he hadn't recovered?

A. Well, I don't -- honestly I can't remember all of the conversation, but if I recall, some of it is kind of timing issues, and so I don't want to say this is exactly what he told me, but by way of example I'll say it. Even if they are back to producing popcorn, there is a long sales pipeline. And so -- so, MFGPC maybe is producing the popcorn, but because of the time frame that they were not selling and they were not able to get to certain customers or certain customers didn't buy because they weren't available. So that impact is not limited to just a narrow period. It can extend for quite some time, and according to my conversations with Mr. Lindley, it did.
Q. Mr. Kilbourne, did you look at Mr. Lindley's actual quarterly sales, based on his royalty reports?
A. Yes.
Q. You did.
Can we have that. That was Exhibit 12, I think. Would you put up 13 and 14 for me instead of 12. There we go. Okay.
So there you have Mr. Lindley's royal -- this is the report that he gives to Mrs. Fields on a quarterly basis. You're aware of that, correct, Mr. Kilbourne?
A. Yes.
Q. All right. Mr. Lindley testified that he keeps track of these numbers himself contemporaneously. Were you

aware of that?

A. I don't know if I recall -- I'm sure he does, but I don't know if I recall that specifically --

Q. And these sales, I don't know if you -- when you were looking through all the documentation you looked at whether you noticed that these sales, the total gross revenue on these royalty reports is less than what he shows on his financial statements. Were you aware of that?

A. I don't recall it specifically.

MS. WHITE: Your Honor, foundation.

MR. AMANI: Well, do you want me to put up a financial statement?

I can tell you now, Ms. White, the 2014 sales -- just to cut through it, if you want, I'll do it. I think you can get them actually from his own report.

Give me one moment.

Sales, according to your report -- oh, you don't have 2013. Actually, let's put them up. Let's just do it.

Exhibit 55.

Keep in mind, 382 for '13 and 186 for '14. We'll come back to those numbers in a minute.

MS. WHITE: Objection, Your Honor, relevance. Why does it matter whether or not there is a discrepancy between the royalty reports to Mrs. Fields? Are they continuing to try to push this theory that they are going belatedly to

assert breach.

THE COURT: What?

MS. WHITE: That they are belatedly going to assert breach? I mean, what is the purpose of this.

MR. AMANI: No. Not at all. We're going to get to a baseline. He's got baseline of, I don't know, $867,000 in sales for this company in 2014. So I'm trying to show the comparison between Mr. Kilbourne's assumption that the company had $867,000 of sales in 2014 and what the actual sales were, and I have two different numbers from your client, and I would like the Court to be aware of that.

THE COURT: He's entitled to try to do that.

Go ahead.

Q. BY MR. AMANI: So let's take a look at 55.

Exhibit 55. Just put up 55 for a moment and go to 2013. Yes. There we go. Here we have $420,000 in sales and --

MS. WHITE: Objection. Is this in evidence?

MR. AMANI: I'm sorry.

MS. WHITE: Objection. Misstates the evidence.

THE COURT: We can't hear you for some reason, Ms. White.

MS. WHITE: I'm objecting, Your Honor, because it misstates the evidence. The sales are only 375 on this report.

MR. AMANI: Oh, I'm sorry.

THE COURT: Yeah. That's correct, it says income is 420.

Q. BY MR. AMANI: Well, you know what, let's go to -- so you have 375 here, and you have an income of 420. Let's look at '14. Now this one you have total sales and total income are the same, $207,443. Do you see that?

A. Yes.

Q. Okay. Now let's go back to -- let's go back to the royalty report for a moment, which is Exhibit 12. And in the royalty report, if you look at it, for 2014 you have 186,629.80 in sales correct?

A. Yes.

Q. And you don't know what the difference is between those two?

A. Well, I don't know what the difference is without looking in more detail. I mean, you have -- it may be a timing issue. It could be that one of them is cash basis, one of them is accrual. In 2013 there were sales of 375, and here he's reporting sales of 382. So, it's higher. And then in 2014, it was 207, and it's 186, so it's lower. So there's likely something going on with timing or cash versus accrual basis, but without looking at the detail of these, which I've looked at it before, but I don't have it to memory. I couldn't tell you what the reason for the

difference is.
Q. Okay. And you didn't take any of that into account?
A. Yes, I did.
Q. You did take into account the differences between these numbers?
A. Well, actually, not in these years, because these were fire-impacted years, but looking at similar things for previous years, I did take that into account.
Q. How did you do that?
A. Well, I took -- first of all what I did was any sort of royalty or accruals for royalties in the financial statements, I removed that, and then I just put in a 5 percent in all the years, and so that eliminates any differences of accrual to cash or any of the timing differences.
Q. But you don't know if this is an accrual. Did you understand that Mr. Lindley had sales other than Mrs. Fields' products?
A. I don't think he has sales of other products, but he may have reported some sort of income of some sort. I have looked at those details in the QuickBooks, but I don't have them committed to memory.
Q. You were unawares that he had sold other products to, for example, Rite Aid?

A. Again, I don't recall without looking back at the detail. If you want to pull that detail up for me, I can look at it, but I don't have it committed to memory.

Q. At least with respect to this report, it's reporting $186,629.80 in sales through Mrs. Fields for the year 2014. Would you agree with me about that?

A. I agree that's the number on this chart.

Q. And based on your own work on how much was owed on account of his invoices, you know for a fact that 70 thousand of those were sales through Mrs. Fields?

A. No, I don't know that.

Q. He had $70,000 of sales through Mrs. Fields in 2014, did he not? Isn't that what you're interest rate is being calculated on, on those invoices?

A. I don't recall. You'll have to show me those invoices. I don't recall the timing.

Q. No need to that. And in your report, just to go to the punch line, you say that in 2014, if I'm not mistaken, you say, in your --

Go back to his report for a moment. It's 60. And go to this table. Go to Exhibit 4. Four. Exhibit 4. Keep rolling. It's an exhibit.

I'm sorry, Your Honor. Mr. Cohen is doing the best he can, Your Honor. Ms. Ryan who worked with me for three years on this case became seriously, seriously ill two weeks

ago, and we have lost her completely at this point in this case, and I apologize. And Mr. Cohen stepped in literally at the very last minute to try to handle these exhibits for me.

THE COURT: Well, that's all right.

MR. AMANI: Attachment 4 to Exhibit 60. Do you have Exhibit 60? We're not pulling it up. I want to go back to -- there it is. He found it. Good for you.

Q. BY MR. AMANI: This is your calculation of sales and profits based on what you call Mrs. -- MFGPC'S own historical financial performance. Correct?

A. Yes.

Q. And you say, in your calculation, that in 2014 Mrs. -- MFGPC had $867,819 in sales.

A. No.

Q. Well, that's your baseline, isn't it, for the year before the year you're going to launch?

A. No. No. Your statement is incorrect.

Q. Okay. Let me ask you a question. So you're going to go from 2012 straight to 2015, and we're skipping '13 and '14?

A. No. No.

Q. How can you explain it to me?

A. Sure. So what you see in this schedule at the top, you see the actual sales of 2010 through 2012, which the

average of that is about $580,000, and then you have a growth rate which is based on the actual historical growth rate of the industry and Mrs. Fields' projection of what's going to happen during the damage period. And so that's grown from 2012 forward, and into the damage period you have 2015, 2016, 2017 and through April of 2018. So the sales in 2013 and 2014 are projected sales absent the buyer and absent the actions of Mrs. Fields of terminating the license agreement.

Q. So absent those projected sales. They didn't happen, did they?

A. No. Those are projected sales.

Q. They don't exist. They never happened in 2013 and 2014?

A. Correct.

Q. In fact, the reality of 2013 and 2014, and I can take you back to the royalty reports if you want, but we went over them. It was 186,000 and 300 and something. 300 something in 2013 and 186,000 in 2014.

Actually go back to the royalty report for one minute if you don't mind, Exhibit 12. '13 and '14.

I forgot to finish up with you on this. Do you see in the fourth quarter of 2013, do you see how much he had in sales?

A. Yes.

Q. Mr. Lindley indicated that that showed that he had recovered. That was, as he himself said, half -- he did in one quarter what he did -- half of what he had done the full year before. Do you have an explanation for that?

A. Well, I mean, first of all, the fourth quarter is typically the best quarter of the year. It's the holiday sales. But you can -- having one quarter does not indicate to me that MFGPC recovered fully from the fire, which is what you were saying before.

Q. So you're saying that Mr. Lindley is wrong when he says that that's indicative of his recovery?

A. Well, I wouldn't say it's wrong. It's part of the recovery, but I would say it's not fully recovered from the fire.

Q. Well, go backwards with me for a minute to 2013 and '12. Let's look at 2011 and '12, those are good. Stay on 2011 and '12. Now we have your sales here. 2011, and that's one of the years you're relying on, correct?

A. Yes, but I'm relying on the financial statements, not the royalty reports.

Q. All right. But, based on the royalty reports -- I'm just comparing royalty reports at this point because that's all I have quarterly numbers for. But if you look at the quarterly numbers that are being reported for Mrs. Fields, in 2011 he's doing 284,000 whereas 2014 we just

showed you he did 300,000, but you're saying he's still impacted. It's still your testimony, to a reasonable degree of professional certainty, that the impact of the fire is still impacting him in the fourth quarter of 2013?

A. Yes, and through 2014. And that's based on Mr. Lindley's explanations to me, which I thought were very reasonable and made sense, given the circumstances and the selling process, the selling pipeline.

Q. Did Mr. Lindley explain to you that he deliberately wanted to use -- what was the word he wanted to use? I have forgotten. I don't have a transcript -- oh, throttle. My paralegal reminds me it was throttle. Did Mr. Lindley tell you will he deliberately throttled sales in 2014?

A. My understanding was 2014 was both impacted by the fire and by the fact that Mr. Lindley was reducing sales in preparation for trying to get outside investors, so yes.

Q. Your understanding is he told you he reduced sales so as to be able to attract outside investors? Is that your testimony?

A. Reducing sales maybe isn't the right way to say it. I guess I want to revise that. But he was focusing on trying to get an outside investor, as opposed to actively selling or running the business as much, so he had shifted some of his focus.

Q. Do you have any understanding of why he needed an

outside investor?

A. He wanted to be able to grow the business and to get more money in to make it -- to make it more profitable and generate more revenue.

Q. As I understand your model for his sales, it assumes that he's going to get that outside investor, does it not?

A. Well, it's -- I mean, I think that Mr. Lindley would probably say to grow it to the level that I'm projecting, he would either have to make additional contributions to the company or get outside money from a permanent investor. There would be some sort of money coming in from some source.

Q. And your model assumes that that money is coming in. Without it, you can't have that kind of growth, right?

A. It's assuming that there is additional capital from someone, Mr. Lindley or an investor.

Q. Can you put the other one back up. And now we're back to his exhibit -- his attachment 4.

All right. So let's go back to your attachment 4 now so I can better understand what you did here. So, you'll agree with me that his sales were either 207,000 or 186,000 in 2014. Those were his actual sales, correct?

A. No. They were 382,000 in '13 and 186 in '14 is what -- the figures you put up before.

Q. That's what I was saying. I was talking about '14. I'm sorry if you didn't hear me correctly. I gave you both numbers, 207 and 186 for '14. You'll agree with me it's one of those two numbers?
A. I'll agree with you that's what's in the royalty reports, but again, you have to remember there might be some timing issues. I don't recall what's in the financial statements of MFGPC.
Q. I'm sorry, Mr. Kilbourne, that wasn't my point. My point was to get you to agree with me the sales in 2014 were somewhere around 200 grand. They are either 207 or 186, whatever it is.
A. That's what's in the royalty report.
Q. Right. And under your theory, he's going to go from sales of that number in -- those are the actual numbers, right?
A. Yes.
Q. He's going to go from those to a million 50. With your reasonable degree of professional certainty, you're almost certain that that's what he can do?
A. Yes.
Q. And even though his growth rate is only 21 percent a year?
A. Yes.
Q. If you skip years '13 and '14 for growth purposes,

those don't count, he's actually going to have to grow 65 percent -- well, actually, the actual number is going to be eight-fold or something along that line, correct?

A. No.

Q. Well, he's going to grow five-fold, I'm sorry. 200 to a million 50?

A. Yeah.

Q. But he's going to have --

A. This business is easily scalable and so, you know, we've seen in other years where sales have gone up and down significantly; down because of external events, and up because Mr. Lindley scaled it back up. And so, being able to scale his business back up, that's not -- that's not unusual or difficult. So, I think it's very reasonable.

Q. I thought in 12 years of business, the maximum he had ever done was 600?

A. Around 600. I think it was a little bit more.

Q. And where had he ever doubled his sales in one year?

A. Well, he went from zero to 200-some-odd thousand the first year, which is a pretty big scale up to go from zero to that. That's pretty substantial.

Q. That was in 2003. After 2003, between 2003 and the present, how was his scaling?

A. Well, from 2007 to 2008, he pretty much doubled

sales.

Q. So you're saying that he's going to double sales from 2012 -- well, you're not saying that. You're actually saying he's going to do five times as much sales between 2014 and 2015 based on this model, right?

A. Yeah. Yeah, and again, the business is very scalable. And to be able to return back to a sales level that's pre-fire, you have to think that he's got a -- he has the co-packers in place. He has customers that have bought from him in place before. Being able to scale this type of a business is -- I would not expect to be that difficult given Mr. Lindley's experience in it and what he has done in the past.

Q. And then if you go, and you take a look at your PSP sales --

Where is that one? Yeah. Go with me to attachment 6. Can you get that one on?

In this version of your lost profits, this is the one which you base it on PSP's projections, right?

A. Yes.

Q. In this version of your projections, his sales are going to increase eight-fold between 2014 and 2015, right?

A. Yes. So this is actually perfect evidence, great evidence of the scalability of the company. So Mrs. Fields and Perfect Snacks are saying Perfect Snacks can go from

zero to 1.6 million in one year. And so that's these two independent parties talking about the scalability of what they expect will happen with Perfect Snacks. And so this is perfect evidence that shows that Mr. Lindley, who already had a very established business with packers and a pipeline and customers, could also scale the business. So this -- this shows to us exactly what you're saying it shouldn't show.

Q. What -- what is it in Mr. Lindley's history that shows he can do that?

A. Well the --

Q. A million 6. What is it in his history of his business that says he's going to go from 200,000 in sales in 2014 to a million 6 in 2015?

A. Well, this --

Q. To a reasonable degree of professional certainty?

A. With a reasonable degree of professional certainty, this is one piece of evidence that shows that because Mrs. Fields thinks that Perfect Snacks can do it. Perfect Snacks thinks they can do it. There is no basis to assume that Mr. Lindley could not do it.

Q. I'm sorry. You didn't answer my question, Mr. Kilbourne. What is it in Mr. Lindley's history that gives you the degree of professional certainty that he's going to take the sales from 200,000 in 2014 to a million 6

in 2015?

A. So, it would be all the history of his performance in the past, from 2003 to 2012, where he went, again, from zero to 600,000 in sales in a fairly short period of time. He's had some ups and downs caused by external events, and he's been able to recover from that and scale it back up. So all that, along with this, tells me that's reasonable.

Q. By the way, you know, you did that and you found the analysis on the growth of the popcorn retail business I think between '15 and up. That was your 25 percent number or whatever, some such number, correct?

A. It was 23.6.

Q. 23.6. And did you look backwards to see what the growth of the popcorn business had been in the past?

A. I don't recall.

Q. No? That was not of any importance to you?

A. No. I didn't say that. I just said I don't recall.

Q. You don't recall what it was? We had testimony from Mr. -- I don't know if it was Mr. Scavitto, but one of ours witnesses testified that the business -- Mr. Hornick testified that the business exploded in 2008, that it grew very fast also after 2016. And he used the year 2008. Did you know that it was growing very rapidly between 2008 and the present?

A. If I do, I just don't recall that right now.

Q. Mr. -- Mr. Rothschild showed Ms. Schmandt evidence yesterday, I think it was Exhibit 38 in the TRO, R-38, which showed that the popcorn business was growing very rapidly in 2010, '11, '12, '13 and '14 as well. Did you know that?

A. Well, I knew it was growing in the later years. I don't remember exactly which years the industry research that I had --

Q. How do you explain, if popcorn was growing so fast in those earlier years, and Mr. -- MFGPC'S sales -- sales were, as Mr. Lyon said, growing at effectively the rate of inflation?

MS. WHITE: I just want to get my objection on the record, Your Honor, that counsel mischaracterized Ms. Schmandt's testimony and the exhibit from yesterday.

MR. AMANI: I didn't mischaracterize Mr. Hornick's testimony this morning. He used the year 2008. He was very clear. He said there was a huge increase in '16, too. But he said it had been growing rapidly since 2008, and I'm trying to understand, if that was the case, why -- how do you explain that MFGPC's business isn't keeping up with that national rate?

Q. The point of my objection was not Mr. Hornick, it was Ms. Schmandt.

THE COURT:

MR. AMANI: Okay. So I'll keep it to Mr. Hornick.

THE COURT: All right.

Q. BY MR. AMANI: How do you explain that, Mr. Kilbourne?

A. Well, first of all, I don't know what -- I have to say multiple things because you put in a lot in there. I don't know what this other fellow -- Mr. Hornick, is that what you said?

Q. Yes.

A. I don't know what he said. I don't know what data he was relying on. But you also said that MFGPC grew at the rate of inflation. Well, they didn't. They grew at a much higher rate than inflation. Mr. Lyon, to get that growth rate of inflation, used only two years of growth. And if he had used three years of growth, or all the years of growth, he would have seen a substantially higher --

Q. I actually wanted to get back to that point.

A. I'm not done yet. I'm not done yet. Also you have to look at -- you're trying to look at certain years. I mean there was growth in 2008. If you say that there was growth in 2008 that was higher than MFGPC'S, that may have -- that may have been the case, but we'd also have to understand if there were any other events that happened in MFGPC in 2008. So, you know, you're throwing all sorts of stuff in there, and you're making a messy soup of nothing.

What I know is how much the industry growth -- that the industry grew during the damage period. We know that. And we also know that MFGPC grew in some years very quickly, substantially, by 50 percent or more. And we know that MFGPC grew much more than the inflation rate.
Q. I wanted to get back to your point about that. You made a point that --
THE COURT: Mr. Amani, I assume you're not nearly done with this witness; is that correct?
MR. AMANI: No, Your Honor, not close.
THE COURT: We'll take a 30 minute recess and reconvene about 25 to. Thank you.
MR. AMANI: Thank you, Your Honor.
(short break)
THE COURT: Let's see. We don't have Mr. Kilbourne yet.
MR. ROTHSCHILD: I'm here, Your Honor.
THE COURT: Go ahead, Mr. Amani.
MR. AMANI: Thank you, Your Honor.
Q. BY MR. AMANI: Mr. Kilbourne, if 2014 wasn't impacted by the fire, but was in fact -- the sales were as -- were deliberately scaled back, would that impact your analysis?
A. Under that hypothetical, I still would say probably not because they were deliberately scaled back.

Q. So there would be no change to your analysis whatsoever? You can still say with a reasonable degree of professional certainty that he could go -- that MFGPC would go from that scaled back amount to those million 50 and million 6 numbers in the following year. Is that right?

A. Yeah. Under your hypothetical, I think that would be true because, again, you know, we see from the Perfect Snacks and Mrs. Fields license that they could scale Mr. Lindley has shown in the past that he could scale. So the fact that he -- if you're saying that he had intentionally pulled it back, that means he could intentionally increase it again.

Q. You will agree with me that you understood that Mr. Lindley didn't want to spend his own capital increasing it anymore, correct?

MS. WHITE: Objection. Misstates prior testimony.

MR. AMANI: I'm asking the witness, does he understand that Mr. Lindley's position was that he was not going to use his own capital to expand, he wanted to find outside capital.

THE COURT: Do you object to that question?

MS. WHITE: Well, I object to the premise that he couldn't use his own capital. That's what I thought Mr. Amani said the first time.

MR. AMANI: I'm sorry, Ms. White. I didn't say

that. If I did, I apologize. I just said he wasn't prepared to.

Q. BY MR. AMANI: You understood that, correct?

A. I mean, I don't know. Mr. Lindley was looking for outside capital, but it's not my understanding that he was unable or unwilling to spend his own capital. He certainly had in the past, and I have no reason to believe he wouldn't continue to do that the future.

Q. If I heard you correctly just before we broke, you did agree that in order to get to the numbers that you're talking about, they would need additional capital?

A. Well, I think that from my conversation with Mr. Lindley, to grow it to kind of the next level, if you will, he needed more capital from himself or from an investor.

Q. And where is the cost of that capital in your analysis?

A. Well, I'm not sure what you mean.

Q. Well, you said you understood from Mr. Lindley that he needed additional capital to grow to the levels you were talking about, correct?

A. Yes.

Q. And there's a cost to capital. Was he going to borrow that money from a bank? If you borrowed that money from a bank you'd pay interest, right?

A. Well, you certainly would if you borrowed money from a bank, yes.
Q. And that would be one of the costs, but you have no costs built into your model for that interest, do you?
A. Well, no, because I don't know that Mr. Lindley was looking to borrow that money from a bank. He was looking to either invest more from himself or from another investor, which would not be involved.
Q. But if you got it from another investor, that would be a cost to the company as well. Wouldn't there -- there would be an equity dilution at that point, and you would have to include that in your cost, would you not?
A. No, because that wouldn't change the lost profits of the company.
Q. Well, yes, but it would change the lost profits from the entity as it existed in 2014.
A. No, it wouldn't.
Q. All right. Go back to the base sales that we were dealing with.
Could you put up attachment 4 again.
And this is your calculation of lost profits based on MFGPC'S historical financial performance again?
A. Yes.
Q. We went over this. Based on the actual numbers, you're projecting that either they would increase sales five

times, if you look at this particular version, or if you look at the PSP, eight times between 2014 and 2015. That's the reality, correct?

A. Are you going back to your figure that you put forward of actual sales in 2014 of around 200,000?

Q. Well, are you disputing that the actual sales were around 200,000?

A. Well, you've pulled that from a report, a royalty report, and I've looked at 2014, at MFGPC'S income statement for 2014, but I don't have that number in front of me. I don't remember it.

Q. It was 207.

A. From their financial statements?

Q. Yes. 207,000 for 2014. Were you unaware of that?

A. You haven't shown me that. You have shown me royalty reports.

Q. I'm sorry.

55. Exhibit 55. I thought we put it up previously.

2014. Just the top part. Go back. Right there. There you go.

A. Right. Thank you.

Q. Do you agree with me now, 207,000?

A. Yes.

Q. And the other royalty report, I believe was about

186,000?
A. Yes.
Q. Do you recall that? And so I was just rounding it I mean for purposes of this conversation, to 200. And let's assume it's 200. You're okay with -- we both know what it says on the paper. So you're assuming that he's going to go from about $200,000 in sales at MFGPC to either a million 50 in 2015 or a million 6 depending on whether you use your MFGPC historical numbers, as you call them, or your PSP numbers. Correct?
A. Yes.
Q. And you're growth rate is 21 percent annually, correct?
A. Yes.
Q. So if you just do the math with me simply, if you start with that 200, and let's use a 20 percent number, your next year's sales would be 400 under your 20 percent growth rate, the actual sales, right?
A. That's incorrect. You're doing a different -- that's not what I did.
Q. Well, you said that growth would be 21 percent annually based on what you looked at in the marketplace, correct?
A. Yes.
Q. And Mr. -- MFGPC's sales in 2014 were $207,000.

I'll give you the higher number. Correct?
A. Yes. That's correct, but what you're doing --
Q. Wait --
A. What you're doing is not the analysis that I did.
THE COURT REPORTER: Excuse me, Counsel and Witness. Just one at a time.
THE COURT: Good advice.
MR. AMANI: Yes, ma'am.
THE COURT: I second her advice.
MR. AMANI: Yes, ma'am. Yes, sir.
Q. BY MR. AMANI: Let's just work with the $207,000 number. You say that the growth rate that should apply to this company is 21 percent annually, correct?
A. Yes, but not from a figure of 200,000.
Q. Well, but, wait a minute. They have a different growth rate from their actual sales in 2014 than you want to apply?
A. Come on, Mr. Amani, you know what I've done here. We've looked at the schedule. You know exactly what I've done. Don't try and modify what I've done.
Q. Mr. Kilbourne, you've stated to a degree of professional certainty the average rate of growth of this industry is 21 percent, correct?
A. That's what it was during the damage period, yes.
Q. And you have agreed with me, have you not, that the

actual sales of this company in 2014 were $207,000?

A. Yes. But we have also discussed how that sales level was compromised.

Q. It may have been compromised, but it doesn't change where the company started from in 2014, does it?

A. Well, yes, it does, because the company is starting from figures of around 600,000, in 2010, 2011, 2012 and then they were negatively impacted by the fire. So that matters.

Q. And how does that matter when you have to distinguish -- when you want to make just a simple adjustment? How am I going to go from '14 to '15 in actuality? We are dealing with actual profits of this company, are we not? That's -- that was the task, to figure out or project the actual profits of MFGPC, correct?

THE COURT: What is your question? I'm not sure I understand the question.

Q. BY MR. AMANI: My question is, is how is it that you're just going to ignore 2014? What's the basis for ignoring it?

A. Well, the first basis is that the Court said that we should ignore the periods that were impacted by the fire, and I agree with that both from a legal perspective, from the Court saying it's the case, and from an economic perspective. That's appropriate.

Q. Let me ask you this. Do you think that the fact

that he had only -- that MFGPC had only $207,000 in sales in 2014, how do you think that impacted his ability -- their ability to go out and generate new sales in 2015?

A. Well --

MS. WHITE: Objection. Foundation. He's not the owner of MFGPC.

MR. AMANI: Well, he's opining on what they could do.

THE COURT: Well, he is giving opinions about what he is projecting what they can do. That's really what the question is about, so the objection is overruled.

MR. KILBOURNE: Great. So, look, we have multiple data points that tell us this it was a very scalable business, so the fact that the sales are 200 thousand-ish in 2014, because of the fire or because Mr. -- and/or because Mr. Lindley elected to throttle the business back, does not negatively impact his ability to increase them in 2015. We've seen him do it in the past. We have seen that both Mrs. Fields and Perfect Snacks believed that you could go from zero to 1.6 million in one year. All that data tells me that it's perfectly reasonable for Mr. Lindley to go from 200,000 to 1.1 million in one year.

Q. Now, you've said something there I have to ask you about. Where did you get this zero to a million 6?

A. Well, the Perfect Snacks license agreement was

signed and, in the first year -- actually it's 15 months, but the first almost year period, both Mrs. Fields and Perfect Snacks assumed and expected that Perfect Snacks could go from zero to $1.6 million.

Q. Did you understand that that was for two products that Perfect Snacks already had in the marketplace?

A. How could they have had products already? They didn't have a license agreement for that.

Q. Do you understand what Perfect Snacks was selling?

A. Yes.

Q. They were selling something called Cookie Pop. Do you know how long?

A. This --

Q. Do you know how long they had been selling Cookie Pop?

A. No, but this was the start --

Q. No, you --

A. But this was the start of the license agreement with Mrs. Fields.

Q. Well, but they were going to put -- have you seen Perfect Snacks's products?

A. Have I, like, seen the physical products?

Q. Yes.

A. I'm not -- I have seen pictures of it --

Q. Well, have --

A. -- but I have not the seen the physical products.
Q. Have you seen they have other ones? They have Cookie Pop with Snickers on it. They have Cookie Pop with, you know --
THE COURT: Mr. Amani.
MR. AMANI: Yes. I'm asking if he has seen these.
THE COURT: Yeah, but you keep -- you keep -- you start asking a question before he's finished with his answers.
MR. AMANI: I apologize, Your Honor. That I didn't intend to do.
Q. BY MR. AMANI: If I interrupted you, Mr. Kilbourne, my apologizes.
A. Is there a question pending?
Q. Did you -- was it your understanding that Cookie Pop was started from scratch?
A. Well, I knew they were selling the Cookie Pop before, but this is the first time they were selling any product licensed with Mrs. Fields' brand .
Q. This is the first time they have ever put Mrs. Fields' name on their product -- on one of their products?
A. As far as I knew, it was the first license agreement they had with Mrs. Fields.
Q. Did you review the correspondence in this case

between Cookie Pop and Mrs. Fields?
A. I'm sure I did, but I don't -- actually, I don't recall if I did one way or the other. If it was produced, I probably did. I just don't recall.
Q. What did you understand Cookie Pop's distribution circumstances to be, who they were distributing to?
A. I don't recall that right now, one way or the other.
Q. Do you know how many products Cookie Pop had contracted with Mrs. Fields for?
A. I don't recall that.
Q. Do you know if it was more than two?
A. I don't recall one way or the other.
Q. We had testimony that Mr. -- Mr. Lindley's products were in different channels, he had a different number of products in different channels. Did you understand that?
A. Yes.
Q. Okay. Was Cookie Pop in one channel or in different channels? Do you know?
A. I don't recall.
Q. Do you know which channel it was?
A. Again, I don't recall.
Q. Do you know who would -- the principal customer was that Cookie Pop was looking to sell through?
A. I don't recall that information.

Q. Did you ever hear Wal-Mart discussed in the context of Cookie Pop?
A. I don't recall one way or the other.
Q. And -- but did you have an understanding that Cookie Pop was being sold by national retail stores on a national level?
A. Again, I don't recall the details of that.
Q. What did you understand Mr. Lindley's sales at a national level to be by 2013?
A. I don't recall. I mean, I've looked at the detail, but I don't remember as I sit here.
Q. Do you know whether by mid-2013 he had sales to any national retailer?
A. Again, if you want to pull up the detail of sales, which I've looked at, we can, but I don't recall as we sit here.
Q. What happens if he doesn't get the capital somehow? Would that affect your analysis at all?
A. If Mr. Lindley doesn't get outside capital or doesn't --
Q. Doesn't get capital to go into the business, additional capital that he talks about needing? How would that affect your analysis, if at all?
A. I think, as I've mentioned before, based on my conversation with Mr. Lindley, to kind of grow the business

to the next level, he would need additional capital whether from himself or someone else.

Q. So, how would it impact you -- how would it impact your analysis if he did not -- if he was unable to get that additional capital?

A. I mean, I didn't do an analysis to measure how much additional capital he would need and, you know, that's -- to look at the detail of capital requirements versus sales levels, I didn't go into that level of detail.

Q. Did you discuss it with Mr. Lindley?

A. No.

Q. Did you have any understanding as to whether Mr. Lindley had an understanding about how much additional capital he would need?

A. If I -- if he -- if I did know that, I don't recall as I sit here.

Q. As of 2015, do you have any understanding how long, at that point, it would have taken Mr. Lindley to source capital?

A. I don't recall having a discussion about that. I may have looked at some documents, but I don't recall.

Q. Your model assumes it would be available to him almost immediately, does it not?

A. My model assumes that whatever additional capital would be needed to achieve those sales levels would be

available.

Q. From the -- right out of the box, late 2014 or early 2015, correct?

A. Well, I'm not sure what you mean, but my model assumes that whatever capital is needed at any point in time would be available.

Q. And what was your assumption about that capital, that it would just -- that he would just able to get it, correct?

A. I just said, I didn't assume anything about the capital, but I assumed it would be available, whether it was from Mr. Lindley or through another source.

Q. I think you answered yes to my last question, which my question was, did you assume that that capital would just automatically appear?

A. I assumed that whatever capital was needed would be available either through Mr. Lindley or through another source.

Q. As I understand your testimony now, there is no cost associated with that capital?

A. No. That's not accurate. There's always a cost to capital, but to MFGPC it doesn't change their lost profits. If another investor came in and said, you know, here's some money to grow the business, the lost profits to MFGPC are unchanged.

Q. He doesn't have to pay that investor any additional monies for putting in the money?
A. The lost profits to MFGPC are unchanged.
Q. Well, wouldn't MFGPC have to pay a portion of those to a third party, the new investor?
A. Well, that's not the way it works. If we're talking about a new investor to MFGPC then they are an owner of some portion of MFGPC.
Q. Well, in this particular case, Mr. Lindley is seeking to collect for himself a certain amount of lost profits, correct?
A. Mr. Lindley or MFGPC?
Q. And if he had to bring in an outside investor to do all this -- these sales, at least some part of those profits would have to be shared with someone else, correct?
A. If there is an outside investor, then the profits of MFGPC are shared with all the investors.
Q. This 20 percent increase annually of popcorn sales, did you investigate what the source of those increases were?
A. It was -- it was actual historical sales increases of ready-to-eat popcorn.
Q. That was in the aggregate over the whole of the United States, I assume?
A. I believe so. I'd have to go back and look at the data from Mintel, which is the source of the data, but I

believe so. If it was U.S. -- actually, I don't recall if it was U.S. or worldwide. I think it was U.S. data.
Q. And is that -- by way of example, does that mean the companies that in that business, they are all growing at 20 percent, or some of them are growing a lot faster to get to that number?
A. Obviously if it's an industry aggregate, you're going to have some companies less, some companies more.
Q. Did you investigate any companies that had grown their popcorn business 20 percent or more for this time frame?
A. I don't recall if the data from Mintel, the actual industry data was specific by company or if it was overall. We'd have to look at that data, which is referenced in my report.
Q. We had testimony earlier today from one of the co-packers that there were a lot of new entries constantly coming and going into this business. Were you aware of that?
A. I -- I mean, it -- that doesn't matter to me one way or the other.
Q. Well, if this 20 percent sale increase that you're looking at, if that's as a result of new entry, as opposed to existing companies' growth, would that impact your analysis?

A. No. It's not relevant.
Q. So it would not be relevant even if there were no other company out there that grew at 20 percent, existing company? That wouldn't be relevant?
A. Well, there clearly was other companies that grew at 21 percent because that was the overall industry average so there definitely were companies that grew 21 percent. It's not possible to not have them.
Q. Well, I don't know, I'll give you the example of the electrical vehicle business. Now, there's one company that's come in in the last few years and grown leaps and bounds, so one might say that the electrical vehicle business is growing by hundreds of percentages, but it's related to one company, the existing company, one new company. The existing companies are growing slow and steady, to use the term of Mr. Lindley. Do you understand that that happens in industries?
A. Well, of course, but you said that there could be no company growing at 21 percent, and if the average is 21 percent, there are definitely companies growing at 21 percent or more. What you're saying is impossible.
Q. You're not -- you didn't take an average of companies to get 21 percent, you took an average of in this category it's been growing by 21 percent.
A. I took the --

Q. It could be hundreds of companies that add to it every year and that would grow by 21. That would grow the overall category by 21 percent without any company growing, by 21 percent, wouldn't it?
A. No.
MS. WHITE: Your Honor, if counsel could please pause and give the witness an opportunity to respond in full, that would be great.
THE COURT: Well, I talked to you about that before. Please let him finish his answer before you start asking another question.
MR. AMANI: I apologize, Your Honor. It's not intentional.
Q. BY MR. AMANI: Let me talk about the costs of goods in your model for a moment if you don't mind.
Would you put up the comparison that we did.
THE COURT: You're on mute, Mr. Amani.
MR. AMANI: Your Honor, I'm asking Mr. Cohen for a document.
Q. BY MR. AMANI: Let me ask you about -- while I'm looking for that -- the cost of goods. You did a weighted average from 2000 to 2000 -- 2003 to 2012, and you came up with 25 percent, correct?
A. Yes.
Q. And I'll get to this exhibit in a minute.

You're going to have to email it to Ms. white and Mr. Rothschild if you would. It's just -- I'm trying to keep it simple.

And Mr. Lyon talks about a trend. Do you recall that, in his report on the cost of goods sold?

A. No.

Q. You don't remember talking -- you don't remember reading in Mr. Lyon's report about the trend on the cost goods?

A. I'm not sure what trend you're referring to.

Q. Well, if you look at the three years you used '10, '11 and '12, my recollection of those numbers is they went from 28 percent to 22 percent -- maybe it was 17 1/2 percent -- in those three year?

A. Yes. That's correct.

MS. WHITE: What are we talking about?

MR. AMANI: The cost of goods sold.

MS. WHITE: Got it.

MR. KILBOURNE: It's actually the gross margin. It's not the cost of goods --

Q. BY MR. AMANI: The gross margin. I stand corrected. The gross margin. And did your investigate what the gross margin was for 2013?

A. No. I mean, I know I looked at it, but since that was a fire-impacted year, I did not use that data.

Q. I can take you back to it and show it to you and do the math that I'm trying to avoid, but that would be 9 percent. Does that refresh your recollection, it would be about 9 percent?

A. It does not refresh my recollection.

Q. All right. Well, I'm going to have to put up Exhibit 55 again.

Can you do that for me, John, and take me to '13, and then I'll go to '14.

Here we have 2013. This is the income statements you relied upon, correct?

A. No. I didn't rely on this. It's a fire year.

Q. That's right, '13. But you relied on these income statements generally when looking at MFGPC's financial data, correct?

A. I relied on MFGPC'S other income statements, correct.

Q. Right, the ones -- you stopped at 2012, right?

A. Correct.

Q. All right. But looking at this one, you see the gross profit is 38580?

A. Yes.

Q. And if you put that on top of 420026, you get 9 percent. I assume if you put it on top of 375, you would get something north of 10 percent. Do you see that?

A. Yes.
Q. And do you have any understanding of which ones -- which one of those two numbers would apply to calculate the profit margin, the gross profit margin?
A. Not without looking at the detail of what's in the other income, the 45,000.
Q. But you will agree with me that it went down between '12 and '13?
A. Yes.
Q. All right. And then let's look at '14. If you look at '14, now, in this year, you have -- here are the numbers you have, 207, cost goods 192, and a gross profit of 14,716. Do you see that?
A. Yes.
Q. I did the calculation on my calculator and came up with about 7 percent. Would you agree with that?
A. Yes.
Q. And you didn't account for that number either, did you?
A. No. Again because these were periods that were impacted by the fire.
Q. So you believe that the -- the gross profit number in 2014 was also impacted by the fire; is that right?
A. Yeah.
Q. All right. And did you have discussions with

Mr. -- with Mr. Lindley about that?
A. Yes.
Q. And what did he tell you?
A. He told me that '13 and '14 were impacted by the fire.
Q. And did he tell you why his gross margin was so low?
A. I'm sure -- it's clearly a reflection of lower sales, which is from the fire. But I don't recall if we talked about it specifically. I mean, once I understood that '13 and '14 were fire impact periods, I didn't use the data, so I'm not sure. I don't recall what level of detail I went into in my discussions with Mr. Lindley about, you know, other -- other costs.
Q. I was going to ask you about that. Did you have any discussions with him at all about what those other costs were?
A. I had lots of detailed discussions for the previous periods, but for '13 and '14, I don't recall that I was looking at -- I -- I don't recall a conversation with him about those years.
Q. What was it about the fire, for example, in 2014 that impacted his cost of goods, if you know?
A. Again, we have discussed that, but I mean, if you have a substantial decrease in sales, it's going to affect

your profit margins. That's just -- it's going to. Some of it might be a timing issue, you know, you might have purchases that happened in one period that affect the profits in another period. I mean, this is not unusual to me.

Q. All right.

Can you put that comparison document up for me.

MS. SCHMANDT: Bijan, you're muted.

MR. AMANI: Apologies. I can't see it. This is a -- we have extracted from your report, your schedule 5.1 and your schedule 5, these line items, which I think we've copied -- we have literally copied from your report. And I'd like you to look at it and just confirm for me that's your understanding, this these are your numbers?

A. Well, it certainly looks like it. I hope you're not asking me to check every single number with my report, but it appears --

Q. No. I'm representing to you, as a lawyer, we literally copied it from off the page of your report. We haven't altered a thing on it except to put a heading on it that says Exhibit 60, 5-5.1 comparison. Do you see that?

A. Okay. Yes.

Q. Now, my understanding from looking at this is, you went through some kind of exercise where you looked at his expenses from every year from 2003 to 2012 and eliminated a

large number of them from your analysis?
A. Yes, I eliminated some of them, which this comparison shows.
Q. All right. And just so I can understand this fully, the total expenses that Mr. Lindley listed on his financial statements from 2003 were 95,975. Do you see that?
A. Yeah. That's not -- that's not the total expenses, though.
Q. All right. Let's get the definition down. You want to exclude the 75 percent, so go ahead and explain that.
A. So, that is -- that is the overhead expenses. It doesn't include any of the cost of goods sold.
Q. Right. Agreed. So this is just the expenses that would be applied to his net after paying for the cost of goods?
A. Yes, and overhead expenses.
Q. And so you looked at all of his expenses over -- can I ask, did you go through all his books and look at every expense?
A. Well, I mean, I'm not going to say I went through every single one, but, yeah, we -- I spent considerable time looking at the detail of expenses not just overall categories.

Q. How much -- how much have you been paid so far in this case?
A. I don't -- I don't know.
Q. Ball park.
A. Maybe 20, 30, maybe 30, $40,000.
Q. Do you have an outstanding bill?
A. No.
Q. When you went through -- all right. So let's go back to this. 2003. You took his total expenses on -- when I say his, MFGPC'S financial statement. The total expenses for 20 -- 2003 were 95,975, excluding the cost of goods sold. The expenses we are talking about here are just overhead expenses. Do you agree with me on that, 95,975?
A. Yes.
Q. And you reduced those to 66 -- you reduced those in your mind to 6677?
A. Yes, but there's an important part of that that we need to look at. So, let's look at the -- at the top section, which is where I arrive at the 10 percent incremental profit, if you see the third line down is royalties, and if you look at the bottom section, which is 5.1, also the third line down is royalties, and so I took out the royalty line because sometimes -- we know the royalty rate is 5 percent, and sometimes there were some -- there was some variability in the royalty rate which I

attributed to probably, you know, timing differences.

And so, in the -- in 5.1 you see the total of the royalty line of all the years was $199,000, and that number is removed from the top section, but you'll notice that in the lower right-hand corner it says, "Less 5 percent royalty to Mrs. Fields of 5 percent." So, essentially what I'm doing is trying to clean up any sort of errors or timing differences that may exist in the data, and so to say that it went from the 95 thousand in 5.1, which is what their data says, to my calculation of 66,000 is not accurate because you've got to include the 5 percent of royalties.

Q. So then it actually went from 109,000 or 110,000 to 66; is that right?

A. No. No. It went from 99,000 to 66,000 plus 5 percent of whatever the revenue was on the royalties.

Q. I see. Okay. So your 66 is a slight bit more when you put the 5 percent back in?

A. Not a slight bit more. It's quite a bit more.

Q. It's 14,000 more? Is that what it is? I'm trying to understand how much.

A. I mean, I don't recall what the revenue was in 2003, but it's probably fairly close to 14,000. I mean, it would be in that range.

Q. You know he paid the 450,000 the first three 1/2, four years, something like that on the minimums. Do you

recall that?
A. I don't know. He paid minimum royalties.
Q. Yes, didn't he? 2003, '4, '5, '6 and '7?
A. I don't recall specifically, but I know he paid some minimum royalties.
Q. I'm sorry. I missed your answer.
A. I don't recall specific numbers.
Q. Are they in your calculations, those minimum royalties?
A. Well, again, his 5 percent, so the 5 percent is in my calculations, yes.
Q. But he paid $450,000 up front for this -- for this -- for minimum royalties. We have established that in the case already. Where is that in your calculation?
A. It doesn't matter because we're looking at the feature periods where minimum royalties are not relevant. It's the 5 percent. So regardless of what he paid for minimum royalties in early years is not relevant for doing a calculation of lost profits in future years where the 5 percent would apply.
Q. So those costs aren't included is what you're saying. The minimum isn't included, you're just including the actual 5? A number that's derived by multiplying 5 percent times the sales?
A. Let me put it -- yeah. What you're saying is

irrelevant. Let me just give you an example. Let's just say the minimum royalty in 2003 was actually 15 percent of sales. Well, that's not valuable to tell us what his lost profits would be in the future in '15, '16 and '17 because the minimum royalties would not apply. It's the 5 percent that would apply. That's what's relevant.

Q. I'm sorry. I screwed it up on my computer. And let's go through these. I mean -- well, let's look at the last -- the three years you used, 2010, 2011 and 2012. Let's take a look at those three years, if you would, with me. You're saying that his variable costs at that -- I get confused by this. I'm sorry, Mr. Kilbourne. You're removing the variable costs or the fixed costs or something else?

A. What you want to do is understand what the variable costs would be, so if you have a hundred dollars in sales, you want to say: How much would I incur in costs to generate that hundred dollars?

And what I have concluded in this is that MFGPC would have incurred $90 to generate every hundred dollars of revenue, which means that their lost profits are $10.

Q. And that $90 includes the $75 for the cost of goods, correct?

A. So the $90 you would incur includes $75 in cost of goods sold and $15 of overhead costs in my example.

Q. And the 15 includes the 5 percent or not?
A. Yes.
Q. It includes the 5 percent royalty?
A. Yes.
Q. All right. So you're basically saying, putting aside the royalty, their costs will be 10 percent of what, their total sales?
A. No. I'm saying the cost would be 90 percent, which includes all of their costs, including the royalty.
Q. And their overhead costs will be 10 percent?
A. The overhead costs would be -- the overhead costs, which are generally considered to be fixed costs, would be ten -- would be $10.
Q. That's that 10 percent?
A. Yes.
Q. And so you're just leaving it in the fixed costs?
A. No. I'm not sure what you mean by that, when you say leaving it in. Do you --
Q. I'm trying to understand what you're taking out -- I'm sorry. I interrupted you again. Apologies.
A. What I'm saying is for every hundred dollars of revenue that MFGPC would have during the damage period, it would cost them $90 to generate that so their lost profits are $10.
Q. Right.

A. And that $90 consists of all the variable costs of course of goods sold of 75 percent, the royalty rate of 5 percent, and 10 percent, which is the categories of what are generally considered to be fixed costs, but I have determined that some of them will be variable in nature.
Q. I want to stay with just the 10 percent costs. That's the only one I'm interested in at this point. That 10 percent is fixed or variable or some combination of the two?
A. I would assume the 10 percent is variable, meaning that MFGPC would incur that to generate their revenue.
Q. As their overhead?
A. It's an overhead -- they are overhead expenses, yes.
Q. And that's the 10 percent you're talking about?
A. Yes.
Q. And that includes things like marketing, promotions, graphic design?
A. It includes the categories that we're looking at here and others.
Q. You say the categories that we're looking at here.
Actually, you know what, can we go to his Exhibit 60 and take a look at that. You're going to five, the one with the footnotes; yeah. Those footnotes.
And is it fair to state that this is the only place

you have explained in this report what you took out?
A. No. I explained some of it in the body of my report as well.
Q. Where in the body of your report? Without flipping through it, do you know generally where you did that?
A. Not without flipping through it.
Q. All right. Go with me, if you would, then, to page 9. It would be in this section, would it not, in Section A? And we can scroll down slowly, but I'd like you to point out to us where you explained --
A. Yes. It would be in that section.
Q. All right. We'll scroll down slowly as you tell us to so you can point out to us where that is.
A. First of all, it's in paragraph 23.
Q. That's the statement: Thus incremental profits on revenue is approximately 10 percent.
A. MFGPC also incurred other incremental costs of approximately 10 percent of sales --
Q. Right.
A. -- and would pay 5 percent of net sales in royalties and then "thus," the sentence that begins with "thus."
Q. Okay.
And then you can go -- John, take me slowly to the next page.

A. I mean 24 is not direct -- you can stop there. 24 is not directly, but it's also saying, look, that is consistent with what Mrs. Fields determined, and so Mrs. Fields determined that a incremental profit margin of 9 percent, which is very close to my figure of 10 percent.
Q. Okay.
Go onto the next page.
Anything else about your 10 percent in here?
A. Nothing on there.
Q. Go onto the next page.
So have we covered pretty much everything that you would have said inside the body of the report for your 10 percent?
A. Yes, I believe so.
Q. Okay. So now let's go back to your exhibit. And I don't really get an explanation -- will you agree with me that in the body of your report, I can't -- there is no explanation of what you've taken out and why to get to the 10 percent, correct?
A. There's not a detail of it. There's a --
Q. It's Exhibit 60.
A. There's an overall explanation but it's not going through in a detailed line-by-line, which is what I do in attachments 5 and 5.1.
Q. Let's go to attachment -- go down to -- there.

And that's really -- these footnotes are your explanation of what you took out, is it not?
A. Yeah, combined with -- with the comparison to attachment 5.1.
Q. Right. And you say you removed all fees for accounting, administrative expense, automobiles, charitables, dues and subscriptions, miscellaneous, parking fees and tolls, printing, repairs, maintenance and supplies, correct?
A. Right. So, if you look at -- if you look at the next page, the next after 5.1.
Q. Okay.
Go to that, please, John, the next one to 5.1. Slow down.
A. Yeah, right there. You see the first line there is an expense of accounting in 2009 for $900 and there's no other expenses for any other years, so clearly this is a one-time expense. There is no basis to believe there would be another expense like that during the damage period. Likewise, you know, you can see several categories, automobile expense, $102 in 2009. No other expense in other years. So I removed expenses like that that were one-time or incremental in nature.
Q. What else did you remove?
A. I also removed amortization and depreciation

expense, because that's not a -- it's not a cash expense I removed interest because the interest was paid to LHF or Mr. Lindley -- not all of it, but most of it. And it's not considered an operating expense. I removed the management fees or expenses that were paid to Mr. Lindley or to LHF. Actually, they weren't paid, they were accrued, so they were never actually paid. But, again, those are like inter-company transfers. So those were removed.

And then I removed other one-time -- you know, some professional fees that were one-time or design fees that were paid to design packaging that were -- based on my conversation with Mr. Lindley were one-time or incremental in nature.

Q. Okay. Back to the previous one. The only person employed at Mrs. Fields at this periods of time was Mr. Lindley, correct --

A. That's correct.

Q. You know? All right. And you removed all fees that he would have taken?

A. That's correct.

Q. So you have no labor costs in this model, correct?

A. Well, the labor costs are Mr. Lindley's, so whether the profits are lost by Mr. Lindley or MFGPC, you know, it's like an inter-company transfer.

Q. I see. So you're going to go from $200,000 in the

actual sales in 2014 to a million 50 in 2015 or a million 6, depending on which of your two models you're using, and there's going to be no labor involved in that; is that right?

A. Well, Mr. Lindley's labor.

Q. So he's just going to do it for free; is that right?

A. It doesn't matter if he does it for free or if he charges for it. It's still a loss to him.

Q. And so this is -- your -- you projection is that MFGPC is going to grow in these years without any cost of labor, none accounted for, correct?

A. No.

Q. That's not correct? So correct me?

A. Mr. Lindley's labor.

Q. For which -- he's going to give it freely?

A. What you're suggesting is Mr. Lindley should not be compensated for any of his work.

Q. No, just the opposite?

A. And I can't agree with that.

Q. No, I'm sorry. I'm not understanding how a company runs without any labor costs. That's what I'm suggesting. I'm not suggesting he shouldn't be paid. I'm suggesting he should actually be paid a lot of money.

A. No. What you're suggesting is he shouldn't be paid

anything because if you remove -- if you include all the labor costs of Mr. Lindley and then reduce the lost profits by his -- his contributions of salary or management fees, if you take that out of lost profits, then you're saying he shouldn't be compensated. That is exactly what you are saying.

THE COURT: We've been -- we've been over this topic about four times. I think both of your positions are clear.

MR. AMANI: Okay.

Q. BY MR. AMANI: Can I and you about Exhibit 51 -- no, 49. 49. And go with me to the critical needs section.

Critical needs. Go back. It's right here. No. Keep going. I'm sorry. Got it? Good.

This was a presentation in January of 2014 to Mrs. Fields?

A. From who?

Q. From -- well, it was from Cameron Broadbent who testified earlier today. He testified he presented it to Mrs. Fields.

A. Is he a Mrs. Fields employee?

Q. He was a Mrs. Fields employee working with Mr. Lindley at the end of '13 and early '14 to transition somehow into helping Mr. Lindley grow his business.

A. I'm just trying to understand. Is this an internal

Mrs. Fields presentation?

Q. No. It's a presentation by somebody engaged by Mr. Lindley to help him grow the business and was sent to Mrs. Fields as a representation of what MFGPC's current status was and what they were asking for.

A. So this is an MFGPC presentation to Mrs. Fields?

Q. Yes. That's my understanding.

A. Okay.

Q. Have you seen this?

A. I mean, we could look at my documents reviews. I saw a number of presentations like this, but I'd have to look at my list and tell you for certain one way or the other.

Q. And under the critical needs, there is the very first listing, and it falls under the second one, too, the hiring of a senior manager. Did you have any discussions with Mr. Lindley about his critical needs for a senior manager?

A. I don't recall one way or the other.

Q. And where in your cost structure is that -- is there any -- within your cost structure, is there any accounting for a senior manager?

A. I don't have a senior manager in my cost structure. I have Mr. Lindley's costs that he's contributing to the company.

Q. Did Mr. Lindley ever discuss with you what his labor needs were with the company in order to grow it?

A. Well, I know that Mr. Lindley had been the only employee during the entire period of the company's operation.

Q. Did you have an understanding that he believed in order to grow the company he would need additional management assistance?

A. Obviously at some point in time you need additional labor costs, but I don't have -- I don't know at what point that would have come.

Q. Well, in your projections, you have projections that go up in the numbers -- I think they go to a million or something on the order of in you Mrs. Fields -- or in your MFGPC projections. You call it that. They go on the order of something like 3 million in annual sales, or 2.75 million. Would there have been need for additional labor at that --

A. Well, first of all, those numbers you said are not accurate. I don't go up to a projection of 2.7. I go up to a projection of 1.5 million. And so I -- that's assuming that Mr. Lindley is going to continue to operate the business and be able to scale it up. To the extent that, as revenue grows that you're going to generate additional revenue, and it assumes higher costs as well. And so, while

there's not a specific line item for employee costs, it's -- it's well within the increased costs to the company to increase revenue.

So we're looking at percentages, so if you increase the revenue to 1.5 million, you increase the costs to 90 percent of that, which very well could incorporate having an employee or employees or part-time labor or something.

Q. Okay. I want to clear something up from what you said because I'm confused. The 75 percent, that's paid to somebody else. That's paid to co-packers, isn't it?

A. Well, is -- I mean, the lines here, yes, but part of that could be -- I mean, if some of this was brought internal and there are internal costs of goods sold, that could be employees that are -- that are being paid as well. It doesn't have to be all external.

Q. No. But you just indicated that 90 -- you know, as expenses -- as sales go up, you would have an increase in the amount of I guess money you would have to pay to hit that 90 percent. We're only talking about the 10 percent, aren't we?

A. No. No. We're talking about 90 percent.

Q. This senior manager they're would be hired here would be in the 75 percent cost of goods? That's where you would put it?

A. No. If there is a senior manager that's hired,

that cost would be in overhead, which would be --

Q. That would be in the 10 percent?

A. -- which would be -- which would be a --

THE COURT: He wasn't through with his answer, Mr. Amani. Let him finish his answer.

MR. KILBOURNE: Which would be a fixed cost. A senior manager would be a fixed cost.

Q. So that would be part of the 10 percent?

A. Well, I mean you'd have to look at it. But if it's a fixed cost, it wouldn't be -- it wouldn't be relevant as well. If it's a fixed cost, you wouldn't reduce the revenue by the fixed cost.

Q. In this model of yours, where is the money coming from to pay for this manager?

A. Well, I think I've answered that question through my several -- through just this whole line of questioning. I think I've answered that. Do you want me to go through and say it all again?

Q. No. If you think you've answered it, I'll take your answer.

Put up 51, please.

MR. KILBOURNE: Can I interject. I apologize, Your Honor, but my computer is on low battery, and the way I've got it set up, I've got some of my -- like the video device, I might run out of batteries soon, and I might need to

change things. If you -- if you could give me a couple of minutes to readjust a couple things. I apologize for that. But I'm okay now.

THE COURT: All right.

MR. KILBOURNE: And I can continue on.

THE COURT: Let's carry on. How much more do you have of this witness, Mr. Amini?

MR. AMANI: I have a little bit, Your Honor. I'm not positive.

Can we go down to his presentation of September or January -- June. Yeah. And is that the best we can do size-wise?

Q. BY MR. AMANI: Let me ask you if you've seen this.

Go slowly, John. Go up a little bit.

These were presentations that Mr. Lindley testified he made to -- I think this one was to a family office group in Greenwich, in 2012. Have you seen this?

A. I believe I have. I think I could verify by looking at my documents-used list, but I believe I have.

Q. All right.

Go down, John. Go to the section about what he was going to use the money -- that he wants a million dollars. Keep going. Go slow. Keep going. Here. Stop there for a minute.

Did you see -- did you have any discussions with

Mr. Lindley about what's written on this page?
A. I don't recall one way or the other.
Q. Did you talk to him about the fact that he needed a million -- he believed he needed a million dollars in equity funding to lift off?
A. I don't recall having that specific conversation. Again, regardless of where the money is coming from, it doesn't change MFGPC's lost profits.
Q. Well, I'm trying to understand. If you look at this million dollars, look what he needs to use it for. He says he needs to use 500,000 of it to acquire talent to manage the planned expansion. Do you see that?
A. Yes.
Q. Where is that in your model, if at all?
A. It's -- again, as I explained before, there's not a specific line to cover additional fixed costs for management. But there is, within my analysis, the assumption that 90 percent of all the revenue would be used to cover costs. And in some of that may have -- may have been additional employees, but some of these employee costs, a management type of person would be a fixed cost.
Q. Mr. Kilbourne, as I understand it, you say that in 2015 he's going to have either a million 50 or a million 600 in sales, MFGPC, correct?
A. Yes.

Q. All right. And that is going to give you, for overhead, either a hundred thousand, a hundred thousand -- a hundred maybe 5,000 or, in the million 6 case, 160,000 under your model?

A. 150 or 160,000 would be the range, yes.

Q. Right. He says mere in his -- in his presentation to investors as to what he needs money for, he says I'm going to need $500,000 to just get that expansion going?

A. What are you --

MS. WHITE: Your Honor I --

Q. That 500,000 in talent.

I'll finish my question, then you can object.

He's going to need $500,000 just for management purposes to initiate and accomplish that kind of an expansion. And I'm trying to understand, in that model of yours when it says a million 50 and a million 6, where does that 500,000 come from, and how have you accounted for it?

THE COURT: All right. There is an objection.

MS. WHITE: Thank you, Your Honor. I object to the extent he's misrepresenting what this liftoff was aimed at. There is no evidence in this case that what Mr. -- what MFGPC was representing in this particular document is tied to a particular sales number that reflects or basically correlates to what Mr. Kilbourne calculated. These are apples and oranges.

THE COURT: Well, they are to some extent, but I'll let him ask the question. He's asked it. Do you want to answer it, or can you?

MR. KILBOURNE: Yeah. Yeah, I can. And actually that's the answer I was just going to give, at least in part. Mr. Lindley doesn't say, to achieve a million dollars in sales, I need a million dollars in equity funding. And so, what's important here is the tie between what Mr. Lindley is projecting to lift off and what's happening. And there's no -- there's nothing in here that says he needs a million dollars in funding to generate a million dollars in sales, which, by the way, would be kind of ridiculous. I mean, you're not going to collect a million dollars in cash to generate a million dollars in sales. You just don't need that level of investment to generate that level of sales.

Q. Mr. --

Go to the --

Do you see what he wants to use the money for here, what he tells he needs the money for? He needs a million to acquire -- 500,000 to acquire talent, 250 for the economic order quantities and 250 to fund trade spending. Do you see those things?

A. Yes.

Q. You did or didn't have discussions about his own projections of his needs?

A. I don't recall if I did one way or the other about these figures.

Q. Go to the next page with me. All right. And then he says he would need another 4 million in equity in funding over the next two years. Do you see that?

A. To achieve orbital potential.

Q. Exactly. And then let's look at his projections.

And go to -- I think it's the next page.

There's his projections at this point. So he's going from 3 million, a larger number than you had, to 10 and 25 and so forth. Do you see that?

A. Yes. So here he's saying he wants $4 million in funding to get to $50 million in revenue.

Q. But he wants 1 million to get to 3.

A. No. He doesn't say that. Oh, yeah. He says --

MS. WHITE: I think we may have just lost Mr. Kilbourne. I heard a -- I wasn't watching. Sorry.

THE COURT: It looks like we have. On another topic, Mr. Amini, I've been reflecting on your request yesterday about using Mr. Lindley's declarations. Can you hear me?

MR. AMANI: Yes, Your Honor.

THE COURT: I think the appropriate way to use them, if you're going to use them, is to use them when you're -- when he's on the stand. Now, he's on your witness

list?

MR. AMANI: Right.

THE COURT: If you're going to call him, then you can use him there to impeach. That's the appropriate way. I'm not convinced they are hearsay, but that's the appropriate use of them.

MR. AMANI: Thank you, Your Honor. I'll make sure I take that into consideration.

THE COURT: Are we going to get done with Mr. Kilbourne today? I have to end at two.

MR. AMANI: Two is 20 minutes.

THE COURT: Do you have much redirect?

MR. AMANI: I don't think so, Your Honor. I mean, I probably have about 45 more minutes.

THE COURT: You what?

MR. AMANI: I probably have about 45 more minutes.

THE COURT: 45 more minutes?

MR. AMANI: I'm guessing, Your Honor. I'm the worst person in the whole person to guess my own. I apologize for it, but I have never been a good projector. I've never been good at projecting how long things take.

THE COURT: You've already taken about as long on cross as Ms. White took on direct.

MR. AMANI: I understand that. This is an important part of the case, Your Honor.

THE COURT: Well, we'll go 'til two and then organize it so you don't take very long in the morning to finish.

MR. AMANI: I will, Your Honor.

MR. KILBOURNE: I apologize. Am I back again?

MR. AMANI: Yes?

MR. KILBOURNE: Can you hear me?

MS. WHITE: Yes.

THE COURT: Yes, we can.

MS. WHITE: Yes, we can. Can you hear us?

THE COURT: Go ahead, Mr. Amani.

MR. AMANI: Thank you.

Q. Mr. Kilbourne, so when we were looking at it, we were talking about the 1 million in funding, and I think you were in the middle of something. We can come back to it if you have -- if you were still answering a question.

A. Yes.

Q. Okay.

A. So he says that he wants 1 million funding in 2012 and 4 million by 2014, but that 5 million in funding is to grow the business to 10 million in 2014, 25 in 2015, 35 in 2016, 50 in 2017 which is obviously orders of magnitude larger than the projections that I --

Q. Well, the 3 million on that page is one of the orders of magnitude that you've seen, at least with respect

to the PSP projections isn't it?
A. No. It's -- my projection for PSP is substantially less than that.
Q. It's a million 6 for the first year?
A. It's a million 6 in 2015 versus 25 million in this projection.
Q. Right. But it's a million 6 in 2015 -- I've got to find it. And then it's 2 million 275 in '16 and 3 million 625 in '17?
A. Right. So, 3 million 6 in 2017 versus 50 million in this projection.
Q. I understand that, but in order to get to --
A. So I --
Q. I'm sorry. In order to get to the first 3 million, he was telling investors, at least in 2012 that he wanted a million dollars, wasn't he?
A. No. No. He's saying he wants a million dollars in 2012 and 4 million in 2014 to get to all these figures. It's not -- you can't tie the million to the 3 million in 2013.
Q. As it turns out, your model has no provision for any of that in terms of that category, right?
A. My model has no provision for assuming that sales will go to 50 million in 2017.
Q. You can take this down.

Go with me, if you would --
Let's take a look at. Let's do attachment 7, go to his report, attachment 7.
This was your interest calculation, which is --
A. Yes.
Q. -- now, instead of 112, it's 73. Do you have the actual -- because all we saw was the final, you're -- I can ask Ms. white to put it back up. I don't think we need it, but I think it's a $73,000 number. Do you have the math that you did to this degree on this particular exhibit to get to that 73?
A. Yes. So the change would be, obviously -- let me just walk through it. The two invoices of 9 thousand, 60 thousand, those are the same. And the interest rate of 10 percent is also the same. The only change would be that interest is going from October 20, 2020 through July 15, 2020. And so that $42,000 figure I think increased it to about 117,000. And then down below in the royalties, all those figures are the same. Same thing. The interest calculation of 16,000 would increase by a little bit.
And so essentially you have 112,000 minus 42,000. If you adjust for the two interest calculations, that gets us to the 73,000.
Q. And the question I had for you though -- that I actually had for you is that net amount owed to Mrs. Fields

is the 2660. Do you see that?
A. Yes.
Q. Did you ever change that to account for the 2015 royalties that he gave us credit for?
A. I did not. I'm not aware of 2015 royalties.
Q. Could you put up Exhibit -- is it 12? Yes. The first page, very first page. I think it's -- yes. There it is. I've got the right number.
Are you familiar with this -- this -- this document that he sent in or about July 11, 2015?
A. I mean, wasn't the license terminated in December of 2014?
Q. And he had rights to sell up 'til June 30 of 2015. Were you unaware of that?
A. I don't recall being aware of that.
Q. So you were unaware of the fact that his actual final number was 2465643?
A. As opposed to -- what's the other figure?
Q. 26660, I think, without seeing it.
A. I'm sorry. Say that again.
Q. 26660.
A. So --
MS. WHITE: Your Honor this is sort of an issue that is not in dispute. I'm not sure what the point of this is.

THE COURT: Good question.

Q. BY MR. AMANI: I'm -- You know, Your Honor, I'm not sure whether it's in dispute or not because I came into it thinking that the whole -- the royalties were all in dispute.

THE COURT: MFGPC doesn't contest this number; is that correct, Ms. white?

MS. WHITE: That is correct, Your Honor.

MR. AMANI: So there is no contest that this number has to be substituted for the 2660 (as spoken) in his analysis?

MR. KILBOURNE: So, are you saying that it should be 24,656 instead of the 26,660 that I have?

MR. AMANI: Yes.

THE COURT: That's what everyone is saying.

MR. KILBOURNE: Okay. So you're saying the actual -- I had -- my royalty figure is too high by about $2,000.

Q. Also put back his Exhibit 7, if you would for a moment. I have one more thing.

In your calculation, did you give any credit for any interest to Mrs. Fields for royalties that weren't paid timely?

A. Yes, 10 percent from the due date all the way through -- in this schedule, through October 20, 2020. In

my updated schedule, through July 15, 2021.
Q. All right. So that, in other words, the royalties on 15,952.32 for 2012 would have gotten also a 10 percent addition?
A. Yes.
Q. I'm just looking to where I you would go to find that.
A. Well, it's shown in the simple interest line of 16,124.
Q. Oh, I see. Simple interest. Just because I didn't follow it, Mr. Kilbourne. I'm sorry.
A. No problem.
Q. The 10 percent, that's 16124 is interest on what?
A. So, you have got the -- it's the interest on the royalties.
Q. I see. Okay.
You can take that down.
Your last -- your last -- your third analysis, or maybe it was your second analysis. I'm sorry. Was that -- was the 425 you referred to, the $425,000?
A. Yes.
Q. And are you saying in that situation that that's indicative of how much Mr. Lindley would have sold or something different?
A. Well, I'm saying that the 425 is the value that

Mrs. Fields ascribed to the license agreement. And we know, based on the industry data, that the licensee, the value would have been more than what the value is to the licensor, so I see the 425 as a floor, as a minimum of the value to MFGPC.

Q. And how is it related to lost profits over that 3 1/3 year?

A. Well it's a -- again, it's a surrogate for what the minimum value would be.

Q. On the 425, have you now been -- has it been explained to you now that that number is mistaken?

A. No. I don't believe it's mistaken.

Q. Okay.

Put up the license agreement, the PSP license agreement if you would. Exhibit 19.

Did you have a chance to look at the license agreement?

A. I did.

Q. My understanding is you read it pretty carefully because you had some comments on how -- what it was like relative to PSP's -- MFGPC'S license, correct?

A. I did review it, yes.

Q. Go with me to the payment section, if you would.

There it is, just keep that up. That's it. That's it. Got it.

This is the section you were relying on?
A. Section 6.1 and 6.2.
Q. Right. And 6.2 is where you got that number from, you got that -- oh, no, I'm sorry. You got it from both of them, correct?
A. Yes.
Q. So you added the 50,000 in 6.1 to the numbers in 6.2?
A. Yeah. So the numbers in 6.2 are 375, and the number in 6.1 is 50,000, for a total of 425.
Q. And do you see the first sentence of 6.1?
A. Yes.
Q. Which amount will be credited against the running royalty owed during the first contract year.
A. Yes.
Q. Did you understand that that would then be credited -- that 50 would become part of the 375? Did you not understand that?
A. No. I understand that the two of them combined is the minimum royalty and that you have to include both of them.
Q. What do you -- you think the word "credited" means in addition to the 375?
MS. WHITE: Your Honor, to the extent he's calling for a legal conclusion and asking for the expert to

interpret the contract, I'll object.

THE COURT: That objection is sustained, but I guess he can ask about his understanding of it and what he did with it.

Q. BY MR. AMANI: Okay. Your understanding, Mr. Kilbourne -- is it your understanding -- well, you said it. Your understanding is that that 50 is in addition to the 375?

A. Right. I don't remember the details going through this, but I went through it carefully because initially I had the same conclusion, that it was 375. But as I studied the agreement more carefully, I thought it was 425. If I'm wrong, I'm wrong, but that was my understanding.

Q. And if you're wrong, how does that change your analysis?

A. Well, if I'm wrong then you would say that the minimum royalty is -- instead of 425 is 375.

Q. And your number would just simply change from 425 to 375?

A. Yes.

Q. Now, on that analysis you're assuming that sales would be on the order of, at the 375 number, 7 1/2 million and the 475 number or 425 number, 8 1/2 million over the time frame?

A. No. You're really confusing that with my second

analysis, which is the minimum sales. This is saying that Mrs. Fields valued this license agreement as 425, and that's what they -- that's what they -- that's what Perfect Snacks paid for it. And if Mrs. Fields valued it at 425, based on industry data I would expect that the licensee would have an even higher value than 425. And so what I am saying is that minimum value is 425. The licensee, Perfect Snacks and the surrogate MFGPC would be more than 425, which is why I said that's a minimum value of mine.

Q. And how are you assuming that MFGPC could have actually realized that?

MS. WHITE: Objection. Asked and answered.

THE COURT: It has been asked and answered. The objection is sustained.

Q. BY MR. AMANI: Are you assuming -- I'm sorry, Your Honor, I'm confused by this.

Are you assuming that, in order to -- isn't that an assumption that, in order to assume that kind of revenue, minimum revenue, you would have to have corresponding sales of some sort?

A. Well, corresponding sales or value. You know, it's -- it's looking at the value that Mrs. Fields paid for it which, again, based on industry data, is less than what Perfect Snacks or MFGPC would have realized in the license.

Q. I'm not understanding how that value would be

realized, however, from the way -- in your explanation. How does Mrs. -- how does MFGPC realize that 375 -- 425?

A. I don't know how to say it further. Mrs. Fields said: This license is worth 425 to us.

And we know that the purpose of a license agreement is to divide the profits between the licensor and licensee. If it's worth 425 to the licensor, it's worth more than 425 to the licensee.

Q. All right. Consistent with my inability to project my own timing, Your Honor, I don't have anymore questions.

THE COURT: No more questions? Okay. Well, I believe you about your predictions on time.

How much redirect do you have?

MS. WHITE: You know, Your Honor, I think very little.

THE COURT: What does that -- tell me what that means.

MS. WHITE: I'm hoping that means just a few questions and we wrap it up today. How strict is the 2:00 o'clock? Is that a hard stop?

THE COURT: It's pretty hard. Let's see what happens. You've got five minutes at least.

REDIRECT EXAMINATION

BY MS. WHITE:

Q. All right, Mr. Kilbourne, counsel asked you about PSP, Perfect Snacks, and represented to you that they had been in business for awhile -- let me see if I can find it -- and therefore that should have some meaningful impact on their projections of sales in the first year or the second year and third year and should be something for you to take in mind. I don't recall exactly what counsel said about when they started, but I would like to share this document. Can you see this document?

A. Yes.

Q. Okay. Now, I'll scroll to the top. This is Exhibit 18. I believe this has already been admitted. Am I correct? And it is an email correspondence between Frank Florio of Perfect Snacks and Betsy Schmandt at Famous Brands, which was Mrs. Fields, and I'll just let you know it's email correspondence about the negotiations of that license. And I'm going to scroll down here. There's a few back and forths, and at the end of this email is an attachment which is from the Dunn & Brad --

A. Bradstreet.

Q. Bradstreet. So this is a report that Mr. Florio -- that Betsy Schmandt ran when investigating whether or not Perfect Snacks should be a licensee. And if you scroll --

scroll down here, we see the company overview, and it says that Frank Florio is CEO in the year the company started in 2015. Do you see that?
A. Yes.
Q. Does that give you any increased confidence in your ability to -- in the opinions that you rendered before with regard to the value of the negotiated terms in the Perfect Snacks license?
A. Well, it tells me that there were no sales of anything for Perfect Snacks prior to 2015.
Q. So, when counsel was asking you about the prior sales of the Cookie Pop, the brand that later joined Mrs. Fields, we're going to be talking about sales in just the year prior to when they signed the license, aren't we?
A. Yes.
Q. And, again, I think you covered this pretty well, about your -- there were a lot of questions about the amount of capital that MFGPC might need in order to actually meet the sales projections that you had put together. You made the observation that you don't need 1 million in capital to generate 1 million in sales. Do you have any sense of, you know, whether 500 would be enough, 250, or is this just not something that one can just grab out of the air?
A. You can't just grab it out of the air, but it's significantly less than a million.

Q. And I know there were many, many questions about the royalty rate reports and a lot of discussion about different sources of data. At the end of the day, you relied on MFGPC's actual QuickBooks records; is that correct?
A. Yes.
Q. Okay. And you had access to all of their QuickBooks records from 2003 on; is that correct?
A. Yes.
Q. And you were able to talk to Mr. Lindley about what was in those records and reconcile anything that you felt needed to be reconciled?
A. Yes.
MS. WHITE: Your Honor, I have no further questions.
MR. AMANI: One very short thing, Your Honor, if I may, follow-up to you what she asked.
Could you put 18 back up there, Mr. Cohen, very quickly.
THE COURT: What are your questions?
MR. AMANI: Well, I'd like to show -- just show him that document right there.

RECROSS EXAMINATION

BY MR. AMINI:

Q. Mr. Kilbourne do you see this is Exhibit 18. You looked at the Dunn & Bradstreet. It started in 2015. Do you see that?

A. Yes.

Q. Do you recall that it says here -- and this is before the signing of the PSP agreement -- that we're excited to put Mrs. Fields on our current chocolate chip Cookie Pop. The current product is doing extremely well, and our projected sales for this year, 2017, are a million 8 without club business.

Were you aware of that?

A. I don't --

MR. AMANI: Objection, Your Honor.

Hold on, Patrick.

Objection, Your Honor. It's outside the scope of my redirect and it's frankly unsubstantiated. This is a -- there is no actual business records to reflect that.

THE COURT: Well, it is outside the scope of redirect, I think.

MR. AMANI: She asked about the prior production and the Dunn & Bradstreet 2015, and there were no sales up to than point, and this is part of the same thing, Your Honor.

MS. WHITE: No. I asked about the start date of the company.

MR. AMANI: Right, to show that they couldn't have had sales before they signed the agreement, and then that they did the sales saying, with the exhibit that we both agreed could go in, that they had sales already and were projecting a million 8 before they even signed our contract.

THE COURT: Anything else, Ms. white, that you want to say about that?

MS. WHITE: I still think it's outside the scope, Your Honor, and, you know, there is no actual data to support those projected sales. You know, it's correspondence between these folks negotiating the contract.

THE COURT: What is it you really want to ask him? What's the question?

MR. AMANI: I think he took care of it.

THE COURT: What?

MR. AMANI: Again, I think he's told us he was unaware of it, so I think I did it.

I do want to ask what we're doing tomorrow because I've lost track. These witnesses are not going in in any particular order.

THE COURT: So your question is.

By the way, you're excused, Mr. Kilbourne. Thank you very much.

MR. KILBOURNE: Thank you, Your Honor.

THE COURT: So you're asking if they know who they are going to call and in what order tomorrow? Is that your question?

MR. AMANI: Yes. Yes, Your Honor. At this stage, I would love to know.

MR. ROTHSCHILD: Your Honor, I can address that if you'd like.

THE COURT: Yeah. Go ahead.

MR. ROTHSCHILD: Tomorrow, Your Honor, we have a witness we subpoenaed from Mrs. Fields, Cassy Alvey, and I believe she'll go first, followed by Ms. Susan Lindley. And then I believe we'll have wrapped up our case.

THE COURT: Is that helpful, Mr. Amani?

MR. AMANI: Very, Your Honor.

THE COURT: All right. Thank you. We'll start again at 8:30 in the morning. We'll be in recess until then.

MS. WHITE: Thank you, Your Honor.

MR. ROTHSCHILD: Thank you, Your Honor.

(Whereupon the proceedings were concluded for the day)

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I, REBECCA JANKE, do hereby certify that I am a Certified Court Reporter for the State of Utah;

That as such Reporter I attended the hearing of the foregoing matter on July 13, 2021, and thereat reported in Stenotype all of the testimony and proceedings had, and caused said notes to be transcribed into typewriting, and the foregoing pages numbered 218 through 413 constitute a full, true and correct record of the proceedings transcribed.

That I am not of kin to any of the parties and have no interest in the outcome of the matter;

And hereby set my hand and seal this 3rd day of August, 2021.

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REBECCA JANKE, CSR, RPR, RMR